CRIMINAL YEAR SEMINAR

April 19, 2019 - Tucson, Arizona
April 26, 2019 - Phoenix, Arizona
May 3, 2019 - Chandler, Arizona

2019 CRIMINAL YEAR IN REVIEW REPORT

Prepared By:

The Honorable Crane McClennen
Retired Judge of the Maricopa County Superior Court

Distributed By:

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CITES 2018 Alphabetically

C = con. law c = crim. code dui = dui r = crim. rules e = evidence

Alsarraf v. Bernini, 244 Ariz. 447, 421 P.3d 157 (Ct. App. 2018).c
Barns v. Bernini, 245 Ariz. 185, 426 P.3d 313 (Ct. App. 2018).Cr
Cabanas v. Pineda, 246 Ariz. 12, 433 P.3d 560 (Ct. App. 2018).e
City of Tucson v. Tanno, 245 Ariz. 488, 431 P.3d 202 (Ct. App. 2018).e
Diaz v. Bernini, 246 Ariz. 114, 435 P.3d 457 (2019). Cc
Diaz v. Van Wie, 245 Ariz. 235, 426 P.3d 1214 (Ct. App. 2018).c
Dominguez v. Foster, 243 Ariz. 499, 413 P.3d 1249 (Ct. App. 2018).r
E.H. v. Slayton (Conlee), 245 Ariz. 331, 429 P.3d 564 (Ct. App. 2018).Cc
Engstrom v. McCarthy, 243 Ariz. 469, 411 P.3d 653 (Ct. App. 2018).e
Gilbert Pros. Off. v. Foster (Beatty), 245 Ariz. 15, 424 P.3d 416 (Ct. App. 2018).r
Leon v. Marner, 244 Ariz. 465, 421 P.3d 664 (Ct. App. 2018).c
Morreno v. Brinker, 243 Ariz. 543, 416 P.3d 807 (2018).C
Phoeniz City Prosecutor v. Lowery (Craig), 245 Ariz. 424, 430 P.3d 884 (2018).ce
Rasor v. Northwest Hospital LLC, 244 Ariz. 423, 419 P.3d 956 (Ct. App. 2018).e
Ryan v. Napier, 245 Ariz. 54, 425 P.3d 230 (2018).e
Shadid v. State, 244 Ariz. 450, 421 P.3d 160 (Ct. App. 2018).c
Shah v. Vakharwala, 244 Ariz. 201, 418 P.3d 974 (Ct. App. 2018).c
Soza v. Marner, 245 Ariz. 454, 430 P.3d 1265 (Ct. App. 2018).c
Spence v. Bacal, 243 Ariz. 504, 413 P.3d 1254 (Ct. App. 2018).C
Spooner v. City of Phoenix, 246 Ariz. 119, 435 P.3d 462 (Ct. App. 2018).e
State *ex rel.* Montgomeryv. Brain (Hu), 244 Ariz. 525, 422 P.3d 1065 (Ct. App. 2018).c
State *ex rel.* Brnovich v. Miller, 245 Ariz. 323, 429 P.3d 556 (Ct. App. 2018).cr
State v. Acuna Valenzuela, 245 Ariz. 197, 426 P.3d 1176 (2018).re
State v. Ayonayon, 245 Ariz. 286, 428 P.3d 203 (Ct. App. 2018).c
State v. Burgess, 245 Ariz. 275, 428 P.3d 192 (Ct. App. 2018).c
State v. Bush, 244 Ariz. 575, 423 P.3d 370 (2018).Ccr
State v. Carson, 243 Ariz. 463, 410 P.3d 1230 (2018).c
State v. Carter, 245 Ariz. 382, 429 P.3d 1176 (Ct. App. 2018).c
State v. De Anda, 246 Ariz. 104, 434 P.3d 1183 (Ct. App. 2018). c
State v. Duarte, 2018 WL 6241483 (Ct. App. 2018).ce
State v. Dutra, 245 Ariz. 180, 426 P.3d 308 (Ct. App. 2018).c
State v. Escalante, 245 Ariz. 135, 425 P.3d 1078 (2018).re
State v. Francis, 243 Ariz. 434, 410 P.3d 416 (2018).c
State v. Green, 245 Ariz. 529, 431 P.3d 599 (Ct. App. 2018).Cc
State v. Hedlund, 245 Ariz. 467, 431 P.3d 181 (2018).dp
State v. Helm, 245 Ariz. 560, 431 P.3d 1213 (Ct. App. 2018).r
State v. Hernandez, 244 Ariz. 1, 417 P.3d 207 (2018).C
State v. Hulsey, 243 Ariz. 367, 408 P.3d 408 (2018).Cre
State v. Jean, 243 Ariz. 331, 407 P.3d 524 (2018).C
State v. Jones, 245 Ariz. 46, 424 P.3d 447 (Ct. App. 2018). ***rev. granted***. c
State v. Kakauki, 243 Ariz. 521, 414 P.3d 690 (Ct. App. 2018).C
State v. Kellywood, 246 Ariz. 45, 433 P.3d 1205 (Ct. App. 2018).Cr
State v. Kemmish, 244 Ariz. 314, 418 P.3d 1087 (Ct. App. 2018).c
State v. Lantz, 245 Ariz. 451, 430 P.3d 1262 (Ct. App. 2018).c

State v. Lohse, 245 Ariz. 536, 431 P.3d 606 (Ct. App. Oct. 25, 2018).C
State v. Maestas, 244 Ariz. 9, 417 P.3d 774 (2018).c
State v. Malone, 245 Ariz. 103, 425 P.3d 592 (Ct. App. 2018). ***rev. granted***. Cce
State v. Martin, 245 Ariz. 42, 424 P.3d 443 (Ct. App. 2018).r
State v. Matthews, 245 Ariz. 281, 428 P.3d 198 (Ct. App. 2018).c
State v. Medina, 244 Ariz. 361, 418 P.3d 1134 (Ct. App. 2018).cr
State v. Meeds, 244 Ariz. 454, 421 P.3d 653 (Ct. App. 2018).ce
State v. Montes Flores, 245 Ariz. 303, 428 P.3d 502 (Ct. App. 2018).cr
State v. Perry, 245 Ariz. 310, 428 P.3d 509 (Ct. App. 2018).cr
State v. Pina-Barajas, 244 Ariz. 106, 418 P.3d 473 (Ct. App. 2018).ce
State v. Richter, 245 Ariz. 1, 424 P.3d 402 (2018).ce
State v. Sanders, 245 Ariz. 113, 425 P.3d 1056 (2018).re
State v. Scalph, 245 Ariz. 177, 426 P.3d 305 (Ct. App. 2018).c
State v. Smith, 244 Ariz. 482, 422 P.3d 586 (Ct. App. 2018).C
State v. Snee, 244 Ariz. 37, 417 P.3d 802 (Ct. App. 2018).Cc
State v. Todd, 244 Ariz. 374, 418 P.3d 1147 (Ct. App. 2018).re
State v. Trammell, 245 Ariz. 607, 433 P.3d 11 (Ct. App. 2018).c
State v. Trujillo, 245 Ariz. 414, 430 P.3d 379 (Ct. App. 2018).Cce
State v. Turner, 243 Ariz. 608, 416 P.3d 872 (Ct. App. 2018).C
State v. Urrea, 244 Ariz. 443, 421 P.3d 153 (2018).r
State v. Varela, 245 Ariz. 91, 425 P.3d 267 (Ct. App. 2018).C
State v. Weakland, 246 Ariz. 67, 434 P.3d 578 (2019).c
State v. Weaver, 244 Ariz. 101, 418 P.3d 468 (Ct. App. 2018).r
State v. Wein (Goodman), 244 Ariz. 22, 417 P.3d 787 (2018).C
State v. Winegardner, 243 Ariz. 482, 413 P.3d 683 (2018).e
State v. Zeitner, ___ Ariz. ___, 436 P.3d 484 (2019). e
Vanoss v. BHP Copper Inc, 244 Ariz. 90, 418 P.3d 457 (Ct. App. 2018).e
Z.W. v. Foster, 244 Ariz. 478, 422 P.3d 582 (Ct. App. 2018).C

CITES 2018 by Citation

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State v. Carson, 243 Ariz. 463, 410 P.3d 1230 (2018).c

Engstrom v. McCarthy, 243 Ariz. 469, 411 P.3d 653 (Ct. App. 2018).e

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Dominguez v. Foster, 243 Ariz. 499, 413 P.3d 1249 (Ct. App. 2018).r
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State v. Wein (Goodman), 244 Ariz. 22, 417 P.3d 787 (2018).C
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State v. Pina-Barajas, 244 Ariz. 106, 418 P.3d 473 (Ct. App. 2018).ce
Shah v. Vakharwala, 244 Ariz. 201, 418 P.3d 974 (Ct. App. 2018).c
State v. Kemmish, 244 Ariz. 314, 418 P.3d 1087 (Ct. App. 2018).c
State v. Medina, 244 Ariz. 361, 418 P.3d 1134 (Ct. App. 2018).cr
State v. Todd, 244 Ariz. 374, 418 P.3d 1147 (Ct. App. 2018).re

Rasor v. Northwest Hospital LLC, 244 Ariz. 423, 419 P.3d 956 (Ct. App. 2018).e

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State v. Malone, 245 Ariz. 103, 425 P.3d 592 (Ct. App. 2018). ***rev. granted***. Cce
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Phoeniz City Prosecutor v. Lowery (Craig), 245 Ariz. 424, 430 P.3d 884 (2018).ce
State v. Lantz, 245 Ariz. 451, 430 P.3d 1262 (Ct. App. 2018).c
Soza v. Marner, 245 Ariz. 454, 430 P.3d 1265 (Ct. App. 2018).dui

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City of Tucson v. Tanno, 245 Ariz. 488, 431 P.3d 202 (Ct. App. 2018).e
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State v. Lohse, 245 Ariz. 536, 431 P.3d 606 (Ct. App. Oct. 25, 2018).C
State v. Helm, 245 Ariz. 560, 431 P.3d 1213 (Ct. App. 2018).r

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Cabanas v. Pineda, 246 Ariz. 12, 433 P.3d 560 (Ct. App. 2018).e
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State v. Weakland, 246 Ariz. 67, 434 P.3d 578 (2019).dui
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Diaz v. Bernini, 246 Ariz. 114, 435 P.3d 457 (2019). Cdui
State v. Zeitner, ___ Ariz. ___, 436 P.3d 484 (2019). e

Affirmed, Vacated, Reversed, or Overruled

State v. Jean, 239 Ariz. 495, 372 P.3d 1019, ¶¶ 11–20 (Ct. App. 2016),
vac'd, in part, 243 Ariz. 331, 407 P.3d 524 (Jan. 3, 2018).

State v. Francis, 241 Ariz. 449, 388 P.3d 843 (Ct. App. 2017),
vac'd, 243 Ariz. 434, 410 P.3d 416 (Feb. 5, 2018).

State v. Carson, 242 Ariz. 6, 391 P.3d 1198 (Ct. App. 2017),
vac'd, 243 Ariz. 463, 410 P.3d 1230 (Feb. 27, 2018).

State v. Maestas, 242 Ariz. 194, 394 P.3d 21 (Ct. App. 2017),
vac'd, 244 Ariz. 9, 417 P.3d 774 (May 23, 2018).

State v. Wein (Henderson), 242 Ariz. 352, 395 P.3d 1111 (Ct. App. 2017),
vac'd, 244 Ariz. 22, 417 P.3d 787 (May 25, 2018).

State v. Escalante, 242 Ariz. 375, 396 P.3d 611 (Ct. App. 2017),
vac'd, in part, 245 Ariz. 135, 425 P.3d 1078, ¶ 43 (Sep. 14, 2018).

State v. Winegardner, 242 Ariz. 430, 397 P.3d 363 (Ct. App. 2017),
vac'd, 243 Ariz. 482, 413 P.3d 683 (Mar. 26, 2018).

State v. Hernandez, 242 Ariz. 568, 399 P.3d 115 (Ct. App. 2017),
vac'd, 244 Ariz. 1, 417 P.3d 207 (May 18, 2018).

State v. Richter, 243 Ariz. 131, 402 P.3d 1016 (Ct. App. 2017),
vac'd, in part, 245 Ariz. 1, 424 P.3d 402, ¶38 (Aug. 24, 2018).

Ryan v. Napier, 243 Ariz. 277, 406 P.3d 330, ¶¶ 27–34 (Ct. App. 2017),
vac'd, 245 Ariz. 54, 425 P.3d 230 (Aug. 23, 2018).

State v. Weakland, 244 Ariz. 79, 418 P.3d 446 (Ct. App. 2018),
vac'd, 246 Ariz. 67, 434 P.3d 578 (2019).c

State v. Zeitner, 244 Ariz. 217, 418 P.3d 990 (Ct. App. 2018),
aff'd, ___ Ariz. ___, 436 P.3d 484 (2019). e

Phoenix City Pros. v. Lowery, 244 Ariz. 308, 418 P.3d 1081 (Ct. App. 2018).
vac'd, 245 Ariz. 424, 430 P.3d 884 (Dec. 3, 2018).

Diaz v. Bernini, 244 Ariz. 417, 419 P.3d 950 (Ct. App. 2018),
vac'd, 246 Ariz. 114, 435 P.3d 457 (2019). Cc

State v. De Anda, 244 Ariz. 471, 421 P.3d 670 (Ct. App. 2018),
aff'd, 246 Ariz. 104, 434 P.3d 1183 (2019). c

ARIZONA EVIDENCE REPORTER

ARTICLE 1. GENERAL PROVISIONS.

Rule 103(a). Preserving a Claim of Error.

103.a.090 To preserve for appeal the question of **exclusion** of evidence, a party must make a **specific and timely objection,** and must make an **offer of proof** showing that the excluded evidence would be admissible and relevant, unless either the substance of the evidence is apparent from the context of the record, or the trial court excludes the evidence on substantive rather than evidentiary grounds.

State v. Malone, 245 Ariz. 103, 425 P.3d 592, ¶¶ 23–24 (Ct. App. 2018) (defendant contended trial court erred in precluding him from asking hypothetical questions; because record did not show what hypothetical questions defendant would have asked, nor what expert would have said in response, court could not say trial court abused its discretion). ***rev. granted***.

Rule 106. Remainder of or Related Writings or Recorded Statements.

106.015 If the portion of the statement that the party wants admitted does not qualify, explain, or place in context the portion of the statement that is already admitted, or if the portion of the statement that the party wants admitted is not relevant, the trial court should not admit the requested portion.

State v. Pina-Barajas, 244 Ariz. 106, 418 P.3d 473, ¶¶ 11–13 (Ct. App. 2018) (defendant was prohibited possessor and claimed he needed gun for protection; court noted statements defendant sought to admit did not show either imminent threat or lack of legal alternatives and thus did not establish necessity defense, so trial court did not err in precluding their admission).

ARTICLE 2. JUDICIAL NOTICE

Rule 201(b). Judicial Notice of Adjudicative Facts — Kinds of facts.

201.b.120 An appellate court may take judicial notice of any fact of which a trial court could have taken judicial notice, even if the trial court was not requested to take judicial notice.

State v. Sanders, 245 Ariz. 113, 425 P.3d 1056, ¶¶ 33–38 (2018) (defendant claimed he was deprived of jury of 12 qualified jurors because Juror 19, who was later empaneled as presiding juror, was convicted felon and therefore ineligible to serve on jury; court took judicial notice of Juror 19's superior court records of his criminal case, which showed he was discharged from probation in 2008 and paid his restitution in full, thus by operation of law, his civil right to serve as juror was restored in 2008, well before defendant's 2014 trial).

ARTICLE 4. RELEVANCY AND ITS LIMITS

Rule 401. Definition of "Relevant Evidence." (Civil Cases.)

401.civ.010 For evidence to be relevant, it must satisfy two requirements: **First,** the fact to which the evidence relates must be of consequence to the determination of the action (materiality).

Ryan v. Napier, 245 Ariz. 54, 425 P.3d 230, ¶¶ 47–52 (2018) (plaintiff sued sheriff's department for injuries caused when officers used K–9 to apprehend him; trial court allowed expert to testify about United States Supreme Court case of *Graham v. Connor,* which set forth three-part test for reasonableness in context of Fourth Amendment excessive-force claim; court held expert overstepped by testifying that *Graham* governs application of justification defense, but stated that, if expert reasonably relied on factors discussed in *Graham* in forming opinion of officer's conduct, expert could explain factors to jurors, but should not state that "*Graham* factors" originated in Supreme Court opinion).

401.civ.020 For evidence to be relevant, it must satisfy two requirements: **Second,** the evidence must make the fact that is of consequence more or less probable (relevance).

Ryan v. Napier, 245 Ariz. 54, 425 P.3d 230, ¶¶ 47–52 (2018) (plaintiff sued sheriff's department for injuries caused when officers used K–9 to apprehend him; trial court allowed expert to testify about United States Supreme Court case of *Graham v. Connor,* which set forth three-part test for reasonableness in context of Fourth Amendment excessive-force claim; court held expert overstepped by testifying that *Graham* governs application of justification defense, but stated that, if expert reasonably relied on factors discussed in *Graham* in forming opinion of officer's conduct, expert could explain factors to jurors, but should not state that "*Graham* factors" originated in Supreme Court opinion).

Rule 401. Definition of "Relevant Evidence." (Criminal Cases.)

401.cr.350 A photograph is admissible if relevant to an expressly or impliedly contested issue.

State v. Sanders, 245 Ariz. 113, 425 P.3d 1056, ¶¶ 51–55 (2018) (defendant was convicted of first-degree murder and child abuse; even though fact and cause of death were not at issue, court held photographs were relevant to show nature and location of fatal injuries, to help determine degree or atrociousness of crime, to corroborate state witnesses, to illustrate or explain testimony (medical examiner used all but one photograph to explain testimony), to corroborate state's theory of how and why homicide was committed, and to rebut defendant's claim that, because he only spanked victim with belt, it was unforeseeable that his actions would cause her death).

Rule 401. Definition of "Relevant Evidence." (Impeachment Cases.)

401.imp.010 Evidence that tests, sustains, or impeaches a witness's credibility or character is admissible for impeachment or rehabilitation purposes.

State v. Sanders, 245 Ariz. 113, 425 P.3d 1056, ¶¶ 61–64 (2018) (defendant claimed trial court violated his due process right to fair trial by denying his motion for mistrial after prosecutor asked several witnesses, "Do you have an independent recollection of this case," and they responded this was "the worst case of child abuse" they had ever seen; court held prosecutor's questions about witnesses' independent recollections were relevant to establishing their credibility and ability to recall events accurately, and that any prejudice was remedied by trial court's curative instruction).

401.imp.013 If evidence does not test, sustain, or impeach a witness's credibility or character, it is not admissible for impeachment or rehabilitation purposes.

State v. Trujillo, 245 Ariz. 414, 430 P.3d 379, ¶¶ 26–33 (Ct. App. 2018) (defendant was charged with sexual abuse he allegedly committed on 15-year-old at refugee facility; after defendant's supervisor testified about rules concerning interaction with children at facility, defendant sought to introduce evidence that supervisor was fired because "he signed off on a slip that allowed [someone] to drive a vehicle they weren't supposed to drive," but trial court precluded this evidence; court held relevancy of this evidence was tenuous at best because supervisor's testimony concerned rules workers were tasked with following when engaging with children, while supervisor was not terminated for violating those rules, and instead was fired for his failure to comply with policy regarding who was permitted to drive facility's vehicles; further, supervisor was fired 14 months after incident defendant was charged with committing).

401.imp.070 Specific instances of the witness's conduct or a party's conduct are admissible if they show bias, prejudice, interest, or corruption on the part of the witness, or how they may have affected the witness's testimony.

State v. Todd, 244 Ariz. 374, 418 P.3d 1147, ¶¶ 11–16 (Ct. App. 2018) (defendant claimed trial court erred by precluding her from impeaching witness with evidence of his pending charges, contending such evidence demonstrated motive to fabricate with hope that state would show him leniency by cooperating against defendant; court held pending charge was relevant to whether witness had motive to fabricate, thus jurors were entitled to know not only that witness was facing a charge, but also to hear directly from witness whether his testimony was animated by promise, hope, or expectation of leniency in his own case, thus trial court erred by entirely precluding defendant from impeaching witness with his potential motivations, but held, because reliable evidence corroborating witness's testimony predated his need for leniency, probative value of those charges was minimal, and any error in precluding this line of cross-examination was therefore harmless).

State v. Todd, 244 Ariz. 374, 418 P.3d 1147, ¶¶ 17–20 (Ct. App. 2018) (defendant claimed trial court erred by precluding her from impeaching witness with evidence of potential charges, contending such evidence demonstrated motive to fabricate with hope that state would show him leniency by cooperating against defendant; because witness admitted he was worried about being charged as prohibited possessor, he had potential motive to fabricate; jurors should have had opportunity to determine whether witness's fear of being charged motivated him to fabricate, thus defendant should have been allowed to cross-examine witness about that concern and whether it was motivating witness's testimony; however, given circumstances of this case, any error was harmless).

Rule 403. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time. (Civil Cases.)

403.civ.020 If evidence is relevant and therefore admissible, a trial court may exclude that evidence if the opposing party establishes that the evidence poses the danger of *unfair* prejudice, and establishes that the *unfair* prejudice *substantially* outweighs the probative value.

Spooner v. City of Phoenix, 246 Ariz. 119, 435 P.3d 462, ¶¶ 5–6 (Ct. App. 2018) (detective testified before grand jurors, who indicted plaintiff for theft from vulnerable adult and unlawful use of power of attorney; state later dismissed those charges; plaintiff sued city and detective claiming constitutional violations, simple negligence, gross negligence, intentional infliction of emotional distress, and malicious arrest; plaintiff contended trial court erred by pre-

cluding her from using detective's grand jury testimony to impeach credibility at trial; court did not reach issue of admissibility of testimony, and instead held trial court did not abuse discretion in finding danger of unfair prejudice substantially outweighed probative value).

403.civ.040 If evidence is relevant and therefore admissible, a trial court may exclude that evidence if the opposing party establishes the evidence poses the danger of confusing the issues or misleading the jurors, and establishes that this danger of confusing the issues substantially outweighs the probative value.

Spooner v. City of Phoenix, 246 Ariz. 119, 435 P.3d 462, ¶¶ 5–6 (Ct. App. 2018) (detective testified before grand jurors, who indicted plaintiff for theft from vulnerable adult and unlawful use of power of attorney; state later dismissed those charges; plaintiff sued city and detective claiming constitutional violations, simple negligence, gross negligence, intentional infliction of emotional distress, and malicious arrest; plaintiff contended trial court erred by precluding her from using detective's grand jury testimony to impeach credibility at trial; court did not reach issue of admissibility of testimony, and instead held trial court did not abuse discretion in finding danger of confusing jurors substantially outweighed probative value).

Rule 403. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time. (Criminal Cases.)

403.cr.100 Once the trial court determines that a photograph has probative value, the trial court, if requested, must determine whether the photograph has any danger of unfair prejudice, and if so, whether the danger of unfair prejudice substantially outweighs the probative value.

State v. Sanders, 245 Ariz. 113, 425 P.3d 1056, ¶¶ 51–55 (2018) (defendant was convicted of first-degree murder and child abuse; even though photographs were graphic and disturbing, they were not so unduly gruesome to be inadmissible).

Rule 404(b). Other crimes, wrongs, or acts (Criminal Cases).

404.b.cr.225 Evidence of how drug organizations operate may be admissible to show ***modus operandi*** of such organization and thus may be relevant, typically when a defendant was found with large quantities of drugs and asserts, in defense, no knowledge of the drugs.

State v. Escalante, 245 Ariz. 135, 425 P.3d 1078, ¶¶ 22–25 (2018) (state did not allege defendant was transporting drugs as part of drug trafficking organization, and defendant (1) was not found with drugs on his person or in vehicle and amount of drugs found was small, (2) did not assert lack of knowledge as defense, and (3) was not charged with drug conspiracy, thus officer's testimony could not be considered admissible *modus operandi* evidence; defendant did not object, so court reviewed for fundamental error, which it found and found prejudice).

404.b.cr.250 Extrinsic evidence of another crime, wrong, or act is admissible if it is relevant to show **motive**.

State v. Acuna Valenzuela, 245 Ariz. 197, 426 P.3d 1176, ¶¶ 7–14 (2018) (victim and defendant had previously been friends, but victim testified against him in criminal proceedings, for which defendant was convicted and sentenced to prison, and as result, "their relationship soured"; after defendant got out of prison, defendant saw victim, made negative comments to him, including "I did prison time for him," and shot and killed victim; court held evidence of defendant's prior conviction was admissible to show defendant's motive for killing victim; because jurors thus heard evidence of defendant's prior conviction, trial court did not err in severing misconduct with weapons charge from murder charge).

State v. Hulsey, 243 Ariz. 367, 408 P.3d 408, ¶¶ 38–46 (2018) (officers initiated routine traffic stop and arrested driver on outstanding warrant; officer asked defendant to exit vehicle; ultimately, one officer was shot and killed; court held evidence that defendant has used methamphetamine was relevant to explain defendant's reaction to officers' presence and his behavior that followed).

ARTICLE 5. PRIVILEGES

Rule 501. Requirements for a Privilege.

17. Marital.

501.17.080 When a defendant commits a crime against his or her spouse and is charged for that crime, the crime exception to the anti-marital fact privilege allows the witness-spouse to testify about not only that charge, but also about any charges arising from the same unitary event.

Phoenix City Pros. v. Lowery, 245 Ariz. 424, 430 P.3d 884, ¶¶ 1, 10–18 (2018) (husband was concerned wife (defendant) had been drinking and might try to drive, so he parked couple's car behind couple's van to prevent wife from driving away; wife, intoxicated and undeterred by car blocking her way, backed van out, shoving car 15 feet down the driveway; when police arrived, wife was not in van; officer noted property damage to van and car; wife was charged with DUI and criminal damage (domestic violence); court held husband was victim of criminal damage charge, so anti-marital fact privilege did not apply for that charge, and because criminal damage and DUI charges arose out of unitary event, anti-marital fact privilege did not apply for that charge either).

26. Waiver by Statute.

501.26.020 Because the legislature has created certain privileges by statute, the legislature by statute may limit those privileges and limit the extent of a waiver of those privileges.

State v. Zeitner, ___ Ariz. ___, 436 P.3d 484, ¶¶ 18–23 (2019) (court held that, although there was no common-law exception to the physician-patient privilege for fraud, the legislature had created exception for AHCCCS fraud).

27. Waiver by Conduct.

501.27.130 Relying on juvenile characteristics and claiming transient immaturity does not *ipso facto* equate to a mental health defense, nor would it negate an element of the crime, thus it does not waive the physician-patient or psychologist-patient privilege.

Cabanas v. Pineda, 246 Ariz. 12, 433 P.3d 560, ¶¶ 17–25 (Ct. App. 2018) (court held that, until defendant relies on mental health records or otherwise places his mental status at issue, state was not entitled to disclosure of his mental health records or to mental health evaluation).

ARTICLE 6. WITNESSES

Rule 608(b). Character for Truthfulness or Untruthfulness — Specific instances of conduct.

608.b.020 The trial court should preclude impeachment with specific instances of conduct if it concludes that the conduct is not probative of truthfulness.

State v. Duarte, 2018 WL 6241483, ¶¶ 32–34 (Ct. App. 2018) (court held trial court did not abuse discretion in concluding victim's 13-year-old felony conviction for attempted first-degree hindering prosecution was not probative of truthfulness).

State v. Trujillo, 245 Ariz. 414, 430 P.3d 379, ¶ 33 (Ct. App. 2018) (defendant was charged with sexual abuse he allegedly committed on 15-year-old at refugee facility; after defendant's supervisor testified about rules concerning interaction with children at facility, defendant sought to introduce evidence that supervisor was fired because "he signed off on a slip that allowed [someone] to drive a vehicle they weren't supposed to drive," but trial court precluded this evidence; court held supervisor's failure to follow rule did not show character for untruthfulness).

Rule 609(a)(1). Impeachment by Evidence of a Criminal Conviction — Impeachment with a felony conviction.

609.a.1.180 The trial court has discretion to impose limits in order to minimize prejudice, such as "sanitizing" the conviction by not disclosing the nature of the prior conviction.

State v. Todd, 244 Ariz. 374, 418 P.3d 1147, ¶¶ 9–10 (Ct. App. 2018) (defendant contended trial court erred in sanitizing witness's prior conviction to preclude fact it was for receiving stolen property; court held that, even assuming arguendo trial court is barred from sanitizing prior conviction that involves dishonesty, receiving stolen property is not such offense (phrase "dishonesty or false statement" should be construed narrowly to include only those crimes involving some element of deceit, untruthfulness, or falsification, and not crimes such as theft or robbery); and that, because witness's prior convictions did not involve dishonesty or false statements and because witness's prior felony history "was discussed at length at trial," trial court did not err by sanitizing conviction).

Rule 609(a)(2). Impeachment with conviction of crime involving dishonest act or false statement.

609.a.2.010 The phrase "dishonest act or false statement" should be construed narrowly to include only those crimes that involve deceit, untruthfulness, or falsification, thus a misdemeanor or felony conviction is admissible under this section only if the elements of the crime required proving, or the witness's admitting, some element of deceit, untruthfulness, or falsification.

State v. Winegardner, 243 Ariz. 482, 413 P.3d 683, ¶¶ 6–17 (2018) (court held that elements of shoplifting do not necessarily involve deceit, untruthfulness, or falsification).

609.a.2.020 When the legal elements of an offense do not necessarily involve a dishonest act or false statement, the factual basis for the prior conviction may warrant admission of the conviction for impeachment purposes, in which case, the party seeking admission of the prior conviction bears the burden of establishing the factual basis for its admission, which may come from such sources as the indictment, a statement of admitted facts, or jury instructions, but this rule does not permit a "trial within a trial" delving into the factual circumstances of the conviction by scouring the record or calling witnesses.

State v. Winegardner, 243 Ariz. 482, 413 P.3d 683, ¶¶ 19–24 (2018) (because defendant provided trial court with no information showing shoplifting conviction involved dishonest act or false statement, trial court did not abuse its discretion in precluding evidence of shoplifting conviction).

State v. Duarte, 2018 WL 6241483, ¶¶ 20–29 (Ct. App. 2018) (defendant contended trial court erred in precluding him from impeaching victim with her felony conviction for attempted first-degree hindering prosecution; court held offense of hindering prosecution can occur in multiple ways, not all of which necessarily involve "a dishonest act or false statement," thus

it was not *per se* admissible under Rule 609(a)(2); further defendant did not provide trial court with any documentation showing that victim's conviction in particular was one involving "a dishonest act or false statement"; trial court therefore did not err in precluding impeachment).

Rule 609(b). Impeachment by Evidence of a Criminal Conviction — Time limit.

609.b.005 In determining whether to admit a prior conviction for impeachment purposes, the trial court should consider such factors as the nature of the prior offense, the similarity of the prior offense and the present charged offense, the age of the witness, the remoteness of the conviction, the length of the prior imprisonment, the witness's conduct since the prior offense, the importance of the witness's testimony, and the centrality of credibility issue.

State v. Todd, 244 Ariz. 374, 418 P.3d 1147, ¶¶ 5–7 (Ct. App. 2018) (defendant was found guilty of knowingly discharging firearm at residential structure, intentionally discharging firearm from motor vehicle at an occupied structure, and aggravated assault; defendant contended trial court should have allowed her to impeach witness's testimony with evidence of his then 15-year-old conviction for trafficking methamphetamine; court held evidence of witness's 15-year-old conviction did not meet elevated requirements of Rule 609(b): (1) offense was of low probative value because it occurred over 10 years before witness testified; (2) record did not contain specific facts or circumstances indicating probative value of that conviction substantially outweighs its prejudicial effect; and (3) record did not indicate defendant served state with written notice of intent to impeach witness with that conviction as required; thus trial court properly precluded impeachment).

609.b.040 Before the trial court may admit for impeachment evidence of a conviction more than 10 years old, the proponent must give the adverse party reasonable written notice of the intent to use it.

State v. Duarte, 2018 WL 6241483, ¶ 31 (Ct. App. 2018) (court held trial court did not err in concluding written notice given 4 days before trial was not reasonable).

Rule 611(b). Mode and Order of Examining Witnesses and Presenting Evidence — Scope of cross-examination.

611.b.015 A criminal defendant is entitled to confront a witness concerning potential bias or hope of reward.

State v. Todd, 244 Ariz. 374, 418 P.3d 1147, ¶¶ 11–16 (Ct. App. 2018) (defendant claimed trial court erred by precluding her from impeaching witness with evidence of his pending charges, contending such evidence demonstrated motive to fabricate with hope that state would show him leniency by cooperating against defendant; court held pending charge was relevant to whether witness had motive to fabricate, thus jurors were entitled to know not only that witness was facing a charge, but also to hear directly from witness whether his testimony was animated by promise, hope, or expectation of leniency in his own case, thus trial court erred by entirely precluding defendant from impeaching witness with his potential motivations, but held, because reliable evidence corroborating witness's testimony predated his need for leniency, probative value of those charges was minimal, and any error in precluding this line of cross-examination was therefore harmless).

State v. Todd, 244 Ariz. 374, 418 P.3d 1147, ¶¶ 17–20 (Ct. App. 2018) (defendant claimed trial court erred by precluding her from impeaching witness with evidence of potential charges, contending such evidence demonstrated motive to fabricate with hope that state would show him leniency by cooperating against defendant; because witness admitted he was worried about being charged as prohibited possessor, he had potential motive to fabricate; jurors should have had opportunity to determine whether witness's fear of being charged motivated him to fabricate, thus defendant should have been allowed to cross-examine witness about that concern and whether it was motivating witness's testimony; however, given circumstances of this case, any error was harmless).

ARTICLE 7. OPINION AND EXPERT TESTIMONY

Rule 701. Opinion Testimony by Lay Witnesses.

701.040 A person may give an opinion of the value of property if the person is the owner or the equivalent, and any explanation of basis for the opinion goes to weight of the evidence.

City of Tucson v. Tanno, 245 Ariz. 488, 431 P.3d 202, ¶¶ 18–20 (Ct. App. 2018) (even though witness was owner of property, trial court did not abuse discretion in precluding testimony based on hypothetical comparison with increase values of stock in stock market).

Rule 702. Testimony by Expert Witnesses.

702.020 A witness may be qualified as an expert by knowledge, skill, or experience.

Engstrom v. McCarthy, 243 Ariz. 469, 411 P.3d 653, ¶ 27 (Ct. App. 2018) (expert witness was licensed psychologist who had undergone years of training and served as an expert witness in dozens of cases, and had interviewed all relevant parties and reached his expert opinion based on interviews he conducted and facts he learned from those interviews; court held trial court did not abuse its discretion by allowing expert to testify and give his opinions).

702.100 For expert testimony to be admissible, the witness must be qualified as an expert by knowledge, skill, experience, training, or education, and (a) the expert's scientific, technical, or other specialized knowledge must help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case.

Rasor v. Northwest Hospital LLC, 244 Ariz. 423, 419 P.3d 956, ¶¶ 19–25 (Ct. App. 2018) (plaintiff's expert witness had been registered nurse for more than 20 years and had spent first 9 years of her career in coronary care unit of an acute-care hospital, was cross-trained for the ICU, and had gained experience working with patients recovering from open-heart surgery; she was hospital director of wound care at long-term, acute-care hospital for 2 years; her role at that hospital included admission assessments, weekly re-assessments, and care planning; she provided treatments and collaborated with physicians and others for plan and care for patients; she had reviewed plaintiff's medical records, hospital's policies for preventing pressure ulcers, and information from nurses regarding their interaction with plaintiff; court held witness was qualified as expert, and any deficiencies in her review of facts of case went to weight not admissibility).

Rule 702(a). Assist trier of fact.

702.a.070 Because the Arizona legislature has declined to adopt a defense of diminished capacity, a defendant is precluded from maintaining that he or she cannot reflect upon his or her actions (or has a lesser capacity to do so); the defendant may, however, introduce evidence demonstrating an ingrained character trait that rendered it less likely he or she acted with reflection and deliberation.

State v. Malone, 245 Ariz. 103, 425 P.3d 592, ¶¶ 7–22 (Ct. App. 2018) (defendant's proffered expert testimony about brain damage was not to prove he was incapable of reflecting, but was instead offered to demonstrate brain condition that rendered it less likely that he may have done so; court concluded evidence was admissible to extent offered to corroborate defendant's claim he had character trait of impulsivity, but was not admissible to support claim that defendant was "incapable" of reflecting on, or premeditating, homicide; court further held any error in excluding proffered evidence was harmless). ***rev. granted***.

702.a.080 Although an expert may not give an opinion about the defendant's state of mind on the issue of *mens rea,* expert may testify about the defendant's behavior that expert observed ("observation evidence").

State v. Richter, 245 Ariz. 1, 424 P.3d 402, ¶¶ 32–37 (2018) (defendant was convicted of kidnapping and child abuse; court noted it upheld admissibility of observation evidence to rebut *mens rea,* which is necessarily subjective element, but stated that, because duress requires objective inquiry, and because evidence of "a defendant's tendency to think in a certain way or his [or her] behavioral characteristics" is inherently subjective, it concluded that observation evidence is likely not admissible to support duress defense).

Rule 702(b). Testimony based on sufficient facts or data.

702.b.010 A witness who is qualified as an expert may testify in the form of an opinion or otherwise if the testimony is based on sufficient facts or data.

Engstrom v. McCarthy, 243 Ariz. 469, 411 P.3d 653, ¶ 27 (Ct. App. 2018) (expert witness was licensed psychologist who had undergone years of training and served as an expert witness in dozens of cases, and had interviewed all relevant parties and reached his expert opinion based on interviews he conducted and facts he learned from those interviews; court held trial court did not abuse its discretion by allowing expert to testify and give his opinions).

Rule 702(d). Reliably applied principles and methods.

702.d.010 A witness who is qualified as an expert may testify in the form of an opinion or otherwise if the expert has reliably applied the principles and methods to the facts of the case.

Vanoss v. BHP Copper Inc, 244 Ariz. 90, 418 P.3d 457, ¶¶ 13–14 (Ct. App. 2018) (BHP began rebuilding and refurbishing certain facilities at ore mine that had been inoperable for several years, and hired Tetra Tech as independent contractor to refurbish ore chute system in secondary crusher building; during work on project, Vanoss died from apparent fall from fourth floor of secondary crusher building; family contended trial court erroneously granted partial summary judgment in favor of BHP alleging that, as a mine operator, BHP owed nondelegable duty to Vanoss pursuant to certain mine-safety statutes and regulations; court held landowner is not liable to employee of independent contractor for negligence of that contractor; family contended trial court erred by preventing its mine-safety expert from testifying about certain mine-safety statutes and regulations; court noted expert's opinions depended on

attributing vicarious liability to BHP for Tetra Tech's failure to comply with certain mine-safety statutes and regulations, and because trial court had correctly granted summary judgment in favor of BHP on vicarious liability and non-delegable duty, it correctly precluded expert from testifying about statutes and regulations).

Rule 702(f). Statutes and Rules.

702.f.125 For a party offering causation testimony (as opposed to standard-of-care testimony) the expert witness does not have to meet the standards of A.R.S. § 12–2604; admissibility is instead governed by Rule 702 only.

Rasor v. Northwest Hospital LLC, 244 Ariz. 423, 419 P.3d 956, ¶¶ 12–15 (Ct. App. 2018) (plaintiff's expert witness had been registered nurse for more than 20 years and had spent first 9 years of her career in coronary care unit of an acute-care hospital, was cross-trained for the ICU, and had gained experience working with patients recovering from open-heart surgery; she was hospital director of wound care at long-term, acute-care hospital for 2 years; her role at that hospital included admission assessments, weekly re-assessments, and care planning; she provided treatments and collaborated with physicians and others for plan and care for patients; she had reviewed plaintiff's medical records, hospital's policies for preventing pressure ulcers, and information from nurses regarding their interaction with plaintiff; court held witness was qualified as expert, and any deficiencies in her review of facts of case went to weight not admissibility).

Rule 703. Bases of an Expert's Opinion Testimony.

703.010 If the party offering the evidence establishes that experts in a particular field would reasonably rely on certain kinds of facts or data in forming an opinion on the subject, those facts or data need not be admissible for the opinion to be admitted.

State v. Meeds, 244 Ariz. 454, 421 P.3d 653, ¶ 17 (Ct. App. 2018) (court held trial court did not abuse discretion in allowing gang expert to rely on prior police investigation reports in forming opinion that defendant met four criteria for membership in criminal street gang).

Rule 704. Opinion on an Ultimate Issue.

704.010 Opinion evidence is admissible even if it involves an ultimate issue in the case.

State v. Meeds, 244 Ariz. 454, 421 P.3d 653, ¶¶ 13–16 (Ct. App. 2018) (court held trial court did not abuse discretion in allowing gang expert to give opinion that, based on his knowledge and experience of Lindo Park Crips, and based on his review of evidence and his observations at trial, defendant met at least four criteria for membership in criminal street gang).

704.045 Although an expert may not give an opinion about the defendant's state of mind on the issue of *mens rea,* an expert may testify about the defendant's behavior that the expert observed ("observation evidence").

State v. Richter, 245 Ariz. 1, 424 P.3d 402, ¶¶ 32–37 (2018) (defendant was convicted of kidnapping and child abuse; court noted it upheld admissibility of observation evidence to rebut *mens rea,* which is necessarily subjective element, but stated that, because duress requires objective inquiry, and because evidence of "a defendant's tendency to think in a certain way or his [or her] behavioral characteristics" is inherently subjective, it concluded that observation evidence is likely not admissible to support duress defense).

ARTICLE 8. HEARSAY

Rule 801(d)(2)(D). Statements that are not hearsay: Statement by party's agent.

801.d.2.D.020 A statement by an agent is admissible against a principal if it was (1) made by the principal's agent or servant, (2) made during the existence of the agency relationship, and (3) concerned matters within the scope of the agency or employment.

Vanoss v. BHP Copper Inc, 244 Ariz. 90, 418 P.3d 457, ¶ 23 (Ct. App. 2018) (BHP began rebuilding certain facilities at ore mine that had been inoperable for several years; BHP (1) hired Tetra Tech as independent contractor to refurbish ore chute system in secondary crusher building; (2) separately contracted with Stantec Consulting Services to provide general construction and safety management for project; and (3) hired Atwell Anderson as project's general contractor; during work on project, Vanoss died from apparent fall from fourth floor of secondary crusher building; family contended trial court erroneously precluded Stantec employee from testifying that, when she complained to certain Stantec and Atwell employees about safety conditions, they responded that they "were losing a lot of money on this job, and that [they] had to have workforce reduction"; court held that, even assuming these employees made their statements as agents or employees on matter within scope of their respective companies' relationship with BHP while it existed, it was not apparent whether purported admissions related to actions and motivations of BHP rather than Stantec or Atwell).

Rule 803(1). Exceptions to the Rule Against Hearsay — Regardless Whether the Declarant Is Available as a Witness — Present sense impressions.

803.1.010 A hearsay statement is admissible as a present sense impression if (1) the declarant perceived the event or condition, (2) the statement described the event or condition, and (3) the declarant made the statement while perceiving the event or condition or immediately thereafter.

State v. Malone, 245 Ariz. 103, 425 P.3d 592, ¶¶ 31–32 (Ct. App. 2018) (defendant was convicted of killing victim; while victim and her sister were driving to defendant's house, victim was talking to defendant on cell phone, and sister heard victim say: "So you're going to keep threatening me . . . well, whatever, I'm still leaving"; defendant contended statement was hearsay; court held statement was admissible as present sense impression). ***rev. granted***.

U.S. Const. amend. 4 Search and seizure—Legitimate expectation of privacy.

us.a4.ss.xp.010 An individual does not have automatic standing to challenge a search; an individual must have a legitimate expectation of privacy in the searched area before that interest will be protected by the Fourth Amendment, and there are two factors that determine whether the person has a legitimate expectation of privacy, the **first** of which is whether the individual, by conduct, has exhibited an actual (subjective) expectation of privacy.

State v. Jean, 243 Ariz. 331, 407 P.3d 524, ¶ 23 (2018) (officers placed GPS device on truck without warrant; officers stopped truck while owner was driving; defendant was in sleeper berth and claimed he was simply driver-in-training; search revealed 2,140 pounds of marijuana; state never argued defendant lacked subjective expectation of privacy, thus court did not address that issue).

us.a4.ss.xp.020 An individual does not have automatic standing to challenge a search; an individual must have a legitimate expectation of privacy in the searched area before that interest will be protected by the Fourth Amendment, and there are two factors that determine whether the person has a legitimate expectation of privacy, the **second** of which is whether the individual's subjective expectation of privacy is one that society is prepared to recognize as reasonable.

State v. Jean, 243 Ariz. 331, 407 P.3d 524, ¶¶ 24–38 (2018) (officers placed GPS device on truck without warrant; officers stopped truck while owner was driving; defendant was in sleeper berth and claimed he was simply driver-in-training; search revealed 2,140 pounds of marijuana; court held passenger traveling with owner in private vehicle generally has reasonable expectation of privacy that is invaded by government's continually tracking vehicle through surreptitious GPS tracking device).

us.a4.ss.xp.050 An overnight guest has a legitimate expectation of privacy in the host's home.

State v. Hernandez, 244 Ariz. 1, 417 P.3d 207, ¶¶ 11–12 (2018) (officers determined vehicle's insurance had expired, followed vehicle, and turned on emergency lights; shortly thereafter, driver (defendant) turned into private driveway of residence that belonged to his girlfriend and proceeded into backyard area; defendant claimed he spent nights there frequently; court held defendant, as overnight guest, had a reasonable expectation of privacy in its residence and curtilage).

us.a4.ss.xp.120 A resident revokes the general license to approach the front door when circumstances clearly indicate that uninvited visitors are not welcome.

State v. Lohse, 245 Ariz. 536, 431 P.3d 606, ¶¶ 15–20 (Ct. App. 2018) (record suggested public was presented with two barriers, second opaque; further, there was evidence those barriers were coupled with warning sign discouraging entry; court remanded for trial court to make findings of fact to determine what circumstances existed on day in question pertinent to whether defendant had revoked the general license to approach).

U.S. Const. amend. 4 Search and seizure—Investigative stop and reasonable suspicion.

us.a4.ss.is.030 Reasonable suspicion exists when an officer sees a vehicle on the road and finds that the registered owner of the vehicle does not possess a valid driver license; because the officer does not have to rule out an innocent explanation to have reasonable suspicion, the possibility that the vehicle is being driven by someone, other than the owner, who does have a valid license does not negate that reasonable suspicion.

State v. Turner, 243 Ariz. 608, 416 P.3d 872, ¶¶ 4–8 (Ct. App. 2018) (officer saw vehicle make fairly fast turn; officer ran registration check on vehicle and registered owner and discovered that owner (defendant) had revoked driver license; officer stopped vehicle and subsequently arrested defendant for DUI).

us.a4.ss.is.190 If an officer has a reasonable basis to conduct an investigatory stop, the officer may detain the person for a reasonable time; if the officer detains the suspect longer than is reasonable, or if the officer makes a second stop of the person, the officer must have additional reasons for this continual detention or second stop.

State v. Green, 245 Ariz. 529, 431 P.3d 599, ¶¶ 6–9 (Ct. App. 2018) (officer approached defendant's vehicle, saw marijuana pipe, and arrested him for possession of paraphernalia; although officer intended to cite and release defendant, he detained him to check immigration status; when officer removed defendant from patrol vehicle, he saw small plastic bag fall from defendant's lap, which resulted in discovery of heroin and morphine; defendant contended, because officer intended to release him, continued detention was unreasonable; court held that, although officer subjectively intended to release him, he was not entitled to be released, and that officer's subjective intent did not make continued detention unreasonable).

U.S. Const. amend. 4 Search and seizure—Arrest within the home without a warrant.

us.a4.ss.aih.010 An officer may not arrest a person in a home without a warrant unless there is (1) consent or (2) exigent circumstances, which include (a) response to an emergency, (b) hot pursuit, (c) possibility of destruction of evidence, (d) possibility of violence, (e) knowledge that the subject is fleeing or attempting to flee, and (f) substantial risk of harm to the persons involved or to the law enforcement process if the officers must wait for a warrant.

State v. Hernandez, 244 Ariz. 1, 417 P.3d 207, ¶¶ 16–19 (2018) (officers determined vehicle's insurance had expired, followed vehicle, and turned on emergency lights; shortly thereafter, driver turned into private driveway and proceeded into backyard area of residence (curtilage); when vehicle stopped, officer approached, smelled marijuana, and ultimately arrested defendant; court held that, once officers initiated traffic stop and defendant failed to stop and instead led them into backyard area of residence, defendant consented to officers entry into that area: "Hernandez effectively invited them there"; court noted that, under § 28–1595(A), once officers initiate traffic stop, driver of pursued vehicle does not have legal right to fail or refuse to stop).

U.S. Const. amend. 4 Search and seizure—Standing.

us.a4.ss.st.020 Under a trespass theory, a person who is not the owner of a vehicle has standing to raise a Fourth Amendment issue only if the search constitutes a common law trespass of that person's rights.

State v. Jean, 243 Ariz. 331, 407 P.3d 524, ¶¶ 14–20 (2018) (because owner did not cede possession of truck to defendant, and because defendant did not own truck or ever possess truck outside owner's presence and did not have authority to exclude others from truck, and was instead merely driving truck with owner from time to time, defendant did not have standing to challenge use of GPS tracker under trespass theory).

U.S. Const. amend. 4 Search and seizure—Probable cause—Warrant.

us.a4.ss.pc.w.030 A warrant must describe the person or place to be searched in sufficient detail to identify the person or place with reasonable certainty.

State v. Lohse, 245 Ariz. 536, 431 P.3d 606, ¶¶ 21–23 (Ct. App. 2018) (although search warrant listed address of another home on same block, it included such details as color scheme of home, types of fences, that defendant's truck was parked out front (listing its make, model, license plate, and vehicle identification number), and "that Deputies [we]re standing by at the residence, awaiting the completion of a warrant to search the residence/property"; court held that, notwithstanding erroneous address, warrant more than sufficiently described defendant's home with reasonable certainty and particularity.

U.S. Const. amend. 4 Search and seizure—Exclusionary rule and its application.

us.a4.ss.exap.030 If the police conduct a search in compliance with binding precedent that is later overruled, because suppression would do nothing to deter police misconduct in these circumstances, and because it would come at a high cost to both the truth and the public safety, searches conducted in objectively reasonable reliance on binding appellate precedent are not subject to the exclusionary rule.

State v. Jean, 243 Ariz. 331, 407 P.3d 524, ¶¶ 40–47 (2018) (officers placed GPS device on truck without warrant; officers stopped truck while owner was driving; defendant was in sleeper berth and claimed he was simply driver-in-training; search revealed 2,140 pounds of marijuana; because officers conducted search in reasonable reliance on case law existing at time of search, court did not apply exclusionary rule).

U.S. Const. amend. 5 Double jeopardy.

us.a5.dj.040 The guarantee against double jeopardy protects against a second prosecution for the same offense after conviction or acquittal, even when the acquittal was erroneous.

Barns v. Bernini, 245 Ariz. 185, 426 P.3d 313, ¶¶ 26–39 (Ct. App. 2018) (as result of death from vehicle collision, state charged defendant with manslaughter and endangerment, alleged both counts were dangerous, and alleged any lesser-included count was dangerous; trial court instructed on manslaughter, endangerment, and negligent homicide, instructed that state had alleged that manslaughter and endangerment were dangerous offenses, and provided verdict forms by which jurors could find that manslaughter and endangerment were dangerous offenses; jurors found defendant not guilty of manslaughter, guilty of negligent homicide and endangerment, and found endangerment was dangerous offense; prior to polling of jurors, prosecutor brought to attention of trial court that jurors had not been instructed that negligent homicide was alleged to be dangerous, nor had they been given a verdict form for dangerousness for that offense, and asked that jurors be so instructed and returned for deliberation on that issue; defendant objected and trial court refused to do so; court held defendant was not acquitted on issue of dangerousness for negligent homicide, so retrying defendant on that issue did not violate provision against double jeopardy).

U.S. Const. amend. 5 Self-incrimination—Voluntariness hearing.

us.a5.si.010 The trial court's duty to hold a voluntariness hearing, and the state's burden to establish that the confession is admissible, does not arise until the defendant makes a motion to suppress the confession, stating the specific facts supporting the claim that the confession was involuntary or taken in violation of *Miranda.*

State v. Bush, 244 Ariz. 575, 423 P.3d 370, ¶¶ 49–52, 61 (2018) (defendant contended on appeal his confession was involuntary; court noted that, at no point before or during trial did defendant move to suppress evidence of his statements, request voluntariness hearing, or object to admission of his statements, and that defendant did not argue that his failure to do so was based on evidence that "was not then known" or that "could not then have been known" if he exercised "reasonable diligence" to discover it; court thus held defendant forfeited his argument by failing to raise any issue about voluntariness of his confession in timely manner; court further noted that Supreme Court in *Wainwright v. Sykes* clarified rule in *Jackson v. Denno* and rejected interpretation of *Jackson* that it had applied in older line of cases, and therefore disavowed any statements in those older cases that are inconsistent with *Wainwright* or *State v. Alvarado*).

State v. Snee, 244 Ariz. 37, 417 P.3d 802, ¶¶ 3–10 (Ct. App. 2018) (before trial, defendant filed motion to suppress confession, but later withdrew it; on appeal, he argued that § 13–3988(A) required trial court, sua sponte, to conduct a voluntariness hearing because evidence indicated confession was induced by impermissible promise; court rejected defendant's contention).

U.S. Const. amend. 5 Self-incrimination—Voluntariness.

us.a5.si.vol.080 In order for a confession to be involuntary within the meaning of the Due Process Clause, the officers must have exercised **coercive pressure** that was not dispelled; if the totality of the circumstances show the police did not engage in improper conduct that overwhelmed the defendant, or that their conduct did not cause the defendant to give a confession that the defendant otherwise did not want to give, the confession will be considered **voluntary.**

State v. Snee, 244 Ariz. 37, 417 P.3d 802, ¶ 13 (Ct. App. 2018) (court held detective's observation that, quicker interview progressed, sooner it would end, did not, without promise of leniency or more, constitute impermissible promise).

us.a5.si.vol.120 Although a confession is deemed involuntary if the officers exercised **coercive pressure** that was not dispelled, an internal compulsion to confess will not make the confession involuntary. (*Colorado v. Connelly)*

State v. Malone, 245 Ariz. 103, 425 P.3d 592, ¶¶ 33–35 (Ct. App. 2018) (defendant claimed that, because he suffered from brain damage, he might not have understood what he was saying to police, or what he was saying might not have been accurate recollection of events; court noted defendant did not present any evidence suggesting coercive behavior on part of police, and noted report prepared by defendant's expert did not suggest defendant had any difficulty understanding what is happening around him or correctly recollecting events, thus concluded trial did not err in admitting defendant's statements). ***rev. granted***.

U.S. Const. amend. 6 Compulsory process and presentation of evidence.

us.a6.cp.030 If the trial court determines the witness could legitimately refuse to answer essentially all relevant questions on the basis that the testimony might incriminate the person, the trial court may excuse that witness without violating the defendant's Sixth Amendment right to compulsory process; this applies only when the trial court has extensive knowledge of the case and rules that the witness would properly invoke the Fifth Amendment in response to all relevant questions the defendant plans on asking.

State v. Hulsey, 243 Ariz. 367, 408 P.3d 408, ¶¶ 29–31 (2018) (officers initiated routine traffic stop and arrested driver on outstanding warrant; officer asked defendant to exit vehicle; ultimately, one officer was shot and killed; defendant asked trial court to compel driver to testify; because trial court properly concluded driver had reasonable grounds to fear criminal prosecution based on her testimony, court did not abuse discretion by not compelling driver to testify).

U.S. Const. amend. 6 Counsel—Ineffective assistance of counsel; Standards.

us.a6.cs.iac.004 To establish a claim of ineffective assistance of counsel, the defendant must show that counsel's actions fell below objective standards of reasonable representation measured by prevailing professional norms.

State v. Varela, 245 Ariz. 91, 425 P.3d 267, ¶¶ 11–14 (Ct. App. 2018) (defendant asserted counsel had filed motion to dismiss his appeal without his consent and failed to communicate with him about Rule 32 proceeding after appeal was dismissed; court held this was sufficient to entitle defendant to evidentiary hearing).

us.a6.cs.iac.013 To establish a claim of ineffective assistance of counsel, the defendant must show that, but for counsel's errors, there is a reasonable probability that the result of the proceeding would have been different.

State v. Varela, 245 Ariz. 91, 425 P.3d 267, ¶¶ 5–10 (Ct. App. 2018) (because defendant was recorded by hidden video camera apologizing to victim and attempting to explain and conceal his behavior, defendant did not provide any evidence to suggest that purported surveillance video or DNA testing would have produced evidence that would have changed result at trial, thus court could not say counsel did not adequately investigate in order to make reasonable tactical decisions).

us.a6.cs.iac.145 In the appeal, the determination of which issues to present is a strategic or tactical decision, and will support a claim of ineffective assistance of counsel only if there was no reasonable basis for the action taken.

State v. Smith, 244 Ariz. 482, 422 P.3d 586, ¶¶ 10–12 (Ct. App. 2018) (record demonstrated counsel did not base his decision not to raise curtilage issue on reasoned evaluation of strength of curtilage claim, but instead on unreasonable misunderstanding of probable-cause evaluations, thus counsel's performance was deficient; court remanded for determination whether defendant suffered prejudice).

U.S. Const. amend. 6 Trial by jury—*Apprendi*/*Blakely*/*Alleyne* issues.

Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (June 24, 2004).

us.a6.jt.a/b.010 Other than the fact of a previous conviction, any fact that increases the penalty for a crime beyond the prescribed statutory **maximum** must be submitted to the jurors, and proved beyond a reasonable doubt.

State v. Trujillo, 245 Ariz. 414, 430 P.3d 379, ¶ 24 (Ct. App. 2018) (defendant was convicted of sexual abuse, and trial court ordered him to register as sex offender; court held that sex-offender registration pursuant to § 13–3821(A)(3) is not subject to statutory maximum, so *Apprendi* does not apply).

us.a6.jt.a/b.035 Although sex-offender registration pursuant to § 13–3821(A)(3) is a penalty under the *Derendal* collateral consequences test, it is not a penalty that increases the statutory maximum sentence for sexual abuse under § 13–1404(A) because the overriding purpose of § 13–3821 is facilitating the location of child sex offenders by law enforcement personnel and thus its purpose is regulatory in nature, not punitive, so *Apprendi* does not apply to § 13–3821(A)(3).

State v. Trujillo, 245 Ariz. 414, 430 P.3d 379, ¶¶ 19–21 (Ct. App. 2018) (defendant was convicted of sexual abuse, and trial court ordered him to register as sex offender).

U.S. Const. amend. 14 Due process—Collection, retention, and disclosure of evidence.

us.a14.dp.ev.020 When the state has failed to preserve evidence the exculpatory nature of which is unknown or is only potentially exculpatory, the defendant must show the state acted in bad faith in order to show a due process violation.

State v. Hulsey, 243 Ariz. 367, 408 P.3d 408, ¶¶ 16–19 (2018) (victim was shot in head, x-ray taken during autopsy revealed few scattered bullet fragments in skull; victim was later cremated; defendant contended state acted in bad faith in destroying evidence; because exculpatory nature evidence was only potentially exculpatory, state did not act in bad faith).

U.S. Const. amend. 14 Due process—Disclosure.

us.a14.dp.dsc.030 Exhumation of a victim's body is to be allowed only under extraordinary circumstances; when existence of evidence sought is speculative and uncertain, and its value in aiding defendant's defense conjectural and remote, trial court may properly exercise its discretion in denying exhumation.

State v. Hulsey, 243 Ariz. 367, 408 P.3d 408, ¶¶ 11–14 (2018) (victim was shot in head, x-ray taken during autopsy revealed few scattered bullet fragments in skull; victim was later cremated; defendant contended examination of bullet fragments could have determined whether victim was shot with defendant's gun or officer's gun; because prospect that analysis of remains would aid defendant's defense was speculative, trial court did not abuse discretion in denying motion to exhume).

Ariz. Const. art. 2, sec. 2.1(A)(5). Victim's rights — Right to refuse an interview, deposition, or other discovery request.

az.2.2.1.a.5.080 In order to be entitled to victim's medical records, defendant must show a reasonable probability that medical records have information to which defendant is entitled to get as a matter of due process.

State v. Kellywood, 246 Ariz. 45, 433 P.3d 1205, ¶¶ 7–10 (Ct. App. 2018) (defendant was charged with sexually molesting adopted daughter when she was between 11 and 14 years old and sought her medical and counseling records for period of time she lived in his home, asserting "defense counsel needs possible exculpatory evidence which may be in the records of [victim's] medical professionals and counselors; oftentimes, these professionals directly ask questions concerning whether or not someone has been sexually inappropriate with them"; court held "reasonable possibility" requires more than conclusory assertions or speculation on part of requesting party, and that defendant did not demonstrate reasonable possibility that medical and counseling records he sought contained exculpatory information).

Ariz. Const. art. 2, sec. 2.1(C). Victim's rights—Definition of "victim."

az.2.2.1.c.070 The Arizona Constitution provides that, if the person is killed or is incapacitated, "victim" includes the person's spouse, parent, child, or other lawful representative, and A.R.S. § 13–4401(19) has broadened that class to include grandparent, sibling, or any other person related to the person in the second degree by consanguinity or affinity; but nothing in the constitution or statute provides that only one of these classes of persons may be considered the victim's representative.

E.H. v. Slayton (Conlee), 245 Ariz. 331, 429 P.3d 564, ¶¶ 1–10 (Ct. App. 2018) (Conlee was charged with killing victim, and trial court had designated advocate from county victim witness services as victim's representative; court held trial court erred in refusing to designate victim's sister as additional representative).

az.2.2.1.c.140 The constitutional protections afforded a crime victim do not mandate that a specific term be used in referring to the victim during court proceedings; instead, the superior court retains discretion to address—on a case-by-case basis—whether using a particular term to refer to a victim violates the victim's right to be treated with respect and dignity.

Z.W. v. Foster, 244 Ariz. 478, 422 P.3d 582, ¶¶ 2–7 (Ct. App. 2018) (court held trial court was permitted to refer to "alleged victim"; stated it would be proper to refer to "victim" when there was no dispute that someone committed offense, and only question was whether defendant was person who did so).

Ariz. Const. art. 2, sec. 8. Right to privacy.

az.2.8.070 When police officers act with the authority of law, they do not violate a person's right of privacy.

State v. Hernandez, 244 Ariz. 1, 417 P.3d 207, ¶ 23 (2018) (officers determined vehicle's insurance had expired, followed vehicle, and turned on emergency lights; shortly thereafter, driver turned into private driveway and proceeded into backyard area of residence (curtilage); when vehicle stopped, officer approached, smelled marijuana, and ultimately arrested defendant; court held that, once officers initiated traffic stop and defendant failed to stop and instead led them into backyard area of residence, defendant consented to officers entry into that area; court noted that, under § 28–1595(A), once officers initiate traffic stop, driver of pursued vehicle does not have legal right to fail or refuse to stop, thus defendant was not illegally "disturbed in his private affairs").

az.2.8.110 Because a warrantless breath test is allowed as a search incident to a lawful DUI arrest, the Fourth Amendment does not require suppression of breath-test results ; nor does Article II, § 8 of the Arizona Constitution provide any greater protection from warrantless breath tests.

Diaz v. Bernini, 246 Ariz. 114, 435 P.3d 457, ¶ 6 (2019) (defendant was administered warrantless test after her arrest for DUI, lawfulness of which she did not contest; test results were therefore admissible under Fourth Amendment and Article II, § 8 regardless of whether her consent was voluntary).

Ariz. Const. art. 2, sec. 22. Bailable offenses.

az.2.22.010 To the extent art. 2, § 22(A)(1) denies release to a defendant charged with certain enumerated offenses, it is unconstitutional; instead, a defendant may be denied release only for an offense that inherently demonstrates future dangerousness, and for an offense that does not inherently demonstrate future dangerousness, only if the state proves by clear and convincing evidence that no condition or combination of conditions of release may be imposed that will reasonably assure the safety of the other person or the community.

State v. Wein (Goodman), 244 Ariz. 22, 417 P.3d 787, ¶¶ 2, 20–29 (2018) (defendant was charged with sexual assault; trial courts held state failed to prove defendant was ongoing danger to community and set bail; court held sexual-assault charge alone does not inherently demonstrate that accused will pose unmanageable risk of danger if released pending trial.

Morreno v. Brinker, 243 Ariz. 543, 416 P.3d 807, ¶¶ 24–35 (2018) (defendant was charged with possession of marijuana and possession of drug paraphernalia (both felonies) and released on his own recognizance; 2 months later, he was again arrested and charged with felony possession of marijuana and possession of drug paraphernalia; he failed to appear for his initial appearance, and court issued arrest warrant; he was later arrested and held without bail pursuant to On-Release provision; court held, to extent this section precludes bail for felony offenses committed when person is already admitted to bail on separate felony charge, it satisfies heightened scrutiny under due process clause).

Ariz. Const. art. 2, sec. 23. Trial by jury—Right to a jury.

az.2.23.rj.020 To determine whether the offense mandates a jury trial, the court should consider two things: **First,** under Article 2, section 23, whether the offense is an offense, or shares substantially similar elements as an offense, for which the defendant had a common-law right to a jury trial before statehood.

State v. Kakauki, 243 Ariz. 521, 414 P.3d 690, ¶¶ 1–17 (Ct. App. 2018) (although statute provides six ways in which person may commit theft, because at least one variety of theft has common-law antecedent, defendant charged with misdemeanor theft has right to have guilt determined by jury).

Ariz. Const. art. 2, sec. 24. Rights of an accused—Trial by jury.

az.2.24.rj.070 A defendant is not entitled to a jury trial when charged with multiple petty offenses even if there is the possibility of an aggregate (consecutive) term of more than 6 months.

Spence v. Bacal, 243 Ariz. 504, 413 P.3d 1254, ¶¶ 4–16 (Ct. App. 2018) (defendant was charged with three counts of misdemeanor assault).

Article 6, section 27. Charge to juries; reversal of cause for technical errors—Comment on the evidence.

az.6.27.030 In order for a trial court's statement to be considered a comment on the evidence, the statement must express an opinion of what the evidence proves.

State v. Acuna Valenzuela, 245 Ariz. 197, 426 P.3d 1176, ¶¶ 45–49 (2018) (two defense witnesses testified they had been limited to yes or no answers during pretrial interviews (while record showed they were not so limited); trial court told jurors "She was not required to simply answer her questions yes or no, and she was given the opportunity to answer the questions, so it was not just yes or no"; court stated this constituted statement of what occurred during pretrial interview, devoid of opinions on or inferences from evidence, thus trial court did not impermissibly comment upon evidence in violation of defendant's constitutional rights).

April 15, 2019

28–1321(A) Implied consent—Implied consent to submit to test.

.030 Informing a driver (1) that "Arizona law states that a person who operates a motor vehicle at any time in this state gives consent to a test or tests of blood, breath, urine or other bodily substances"; (2) the officer is authorized to request more than one test and may choose the types of tests; (3) what will happen if the test results are not available or indicate a certain alcohol concentration; (4) the consequences of a refusal or unsuccessful completion the tests; and (5) then asking if the person will submit to the tests does not make any subsequent consent involuntary.

State v. De Anda, 246 Ariz. 104, 434 P.3d 1183, ¶¶ 1, 8–16 (2019) (court rejected defendant's contention that procedure provided by statute and approved in *Valenzuela* required advising officer to give defendant opportunity to consent to testing prior to advising him of consequences of refusal).

.050 The Fourth Amendment does not require suppression of breath-test results because a warrantless breath test is allowed as a search incident to a lawful DUI arrest, thus the state need not establish that the suspect voluntarily consented to the test.

Diaz v. Bernini, 246 Ariz. 114, 435 P.3d 457, ¶¶ 6–8 (2019) (defendant was administered warrantless test after her arrest for DUI, lawfulness of which she did not contest; test results were therefore admissible under Fourth Amendment regardless of whether her consent was voluntary).

.060 Under Arizona's implied consent statute, a law enforcement officer may obtain a blood or breath sample from a person arrested for driving under the influence only if the arrestee expressly agrees to the test; apart from any constitutional considerations, the statute itself does not require that the arrestee's agreement be voluntary.

Diaz v. Bernini, 246 Ariz. 114, 435 P.3d 457, ¶¶ 10–17 (2019) (defendant was administered warrantless breath test after her arrest for DUI; court held word "consent" in subsection (A) was not same as word "agree" in subsection (B), thus held statutory requirement of express agreement to testing did not equate to or necessarily imply a voluntary consent requirement; court noted voluntary consent (or exigent circumstances) was required under the Fourth Amendment only for blood tests).

.070 The exclusionary rule is a prudential doctrine invoked solely to deter future violations, thus when the police act with an objectively reasonable good-faith belief that their conduct is lawful, or when their conduct involves only simple, isolated negligence, the good-faith exception applies because the deterrence rationale loses much of its force, and the exclusionary does not apply.

State v. Weakland, 246 Ariz. 67, 434 P.3d 578, ¶¶ 1, 6–20 (2019) (court held good-faith exception to exclusionary rule applied to blood-test evidence unconstitutionally obtained after *State v. Butler* but before *State v. Valenzuela*).

Alsarraf v. Bernini, 244 Ariz. 447, 421 P.3d 157, ¶¶ 8–11 (Ct. App. 2018) (because officer told defendant Arizona law required him to take BAC test, defendant consent was not voluntary; because officer's language was consistent with language in Arizona cases in effect at time of search, and because state argued good faith exception as soon as possible after *Valenzuela* opinion, court did not apply exclusionary rule and thus did not preclude evidence of BAC).

.080 Like the federal courts, Arizona courts have not employed the exclusionary rule for statutory violations unless the statute implicates Fourth Amendment rights, and have instead left the remedy for any violation to the legislature, and because the legislature has not mandated exclusion as a remedy for a violation of § 28–1321, the courts will not apply the exclusionary rule to a violation of that statute.

Soza v. Marner, 245 Ariz. 454, 430 P.3d 1265, ¶¶ 15–24 (Ct. App. 2018) (court assumed without deciding that Soza's agreement to breath test was involuntary, and because there was no agreement and no warrant, the breath test violated § 28–1321; court held breath test given pursuant to lawful arrest would not violate 4th Amendment, and held exclusionary rule did not apply to violation of § 28–1321).

28–1381(A)(3) Driving or actual physical control—Any illicit drug in the person's body.

.080 The "metabolite" referenced in this section is limited to any metabolite that is capable of causing impairment, which includes Hydroxy-THC, but not Carboxy-THC.

Leon v. Marner, 244 Ariz. 465, 421 P.3d 664, ¶¶ 13–18 (Ct. App. 2018) (defendant had benzoylecgonine (BE) in his system; because BE is inactive metabolite of cocaine, it will not support conviction under this section).

28–1388(E) Blood and breath tests; violation; classification; admissible evidence—Sample of blood, urine, or other bodily substance.

.010 To invoke the medical blood draw exception set forth in this section, the state must establish the following: (1) probable cause existed to believe the suspect was driving under the influence; (2) exigent circumstances made it impractical for law enforcement to obtain a warrant; (3) medical personnel drew the blood sample for medical reasons; and (4) the provision of medical services did not violate the suspect's right to direct his or her own medical treatment.

Diaz v. Van Wie, 245 Ariz. 235, 426 P.3d 1214, ¶¶ 8–13 (Ct. App. 2018) (defendant was found in vehicle that had crashed; defendant was unresponsive and taken to hospital; hospital personnel drew blood for medical purposes and stored it securely; police were advised of fact that medical personnel had drawn blood from defendant for medical purposes, and without attempting to obtain warrant, took custody of portion blood sample; court held state failed to show exigent circumstances and ordered sample suppressed).

.020 In blood-alcohol cases, the Fourth Amendment may be implicated at three stages: (1) the physical intrusion into the body to draw blood; (2) the exercise of control over and the testing of the blood sample; and (3) obtaining the results of the test; when the physical intrusion is conducted by treating medical personnel, independent of government action, the Fourth Amendment does not apply to that stage; in such circumstances, the Fourth Amendment is not triggered until the state takes custody of the existing blood sample, tests it, and receives test results.

Diaz v. Van Wie, 245 Ariz. 235, 426 P.3d 1214, ¶¶ 8 (Ct. App. 2018) (court held state failed to show exigent circumstances and ordered sample suppressed).

.030 As enacted by the Arizona Legislature, this section provided that a law enforcement officer may obtain a portion of a blood sample if (1) medical personnel drew the blood sample for medical reasons, and (2) the officer had probable cause to believe the suspect was driving under the influence; to this, the Arizona Supreme Court has added the requirements that (3) the provision of medical services did not violate the suspect's right to direct his or her own medical treatment, and (4) exigent circumstances made it impractical for law enforcement to obtain a warrant; further, the United States Supreme Court has held that the natural dissipation of alcohol in the bloodstream is not a *per se* exigent circumstance.

Diaz v. Van Wie, 245 Ariz. 235, 426 P.3d 1214, ¶¶ 9–11 (Ct. App. 2018) (as stated by the court: "As a practical matter, our supreme court's recognition of the constitutional exigency requirement as a necessary element of the statutory medical-draw exception renders the statute toothless.").

.040 The natural dissipation of alcohol in the bloodstream is not a *per se* exigent circumstance; the state must establish exigency by showing that, under the circumstances specific to the case, it was impractical to obtain a warrant.

Diaz v. Van Wie, 245 Ariz. 235, 426 P.3d 1214, ¶¶ 2, 11 (Ct. App. 2018) (court notes exigent circumstances will rarely be present when state seeks to effect warrantless seizure of already-preserved blood sample, but they may exist, for example, if "the facility housing the sample were on fire or the custodian was about to immediately dispose of or alter the sample").

11–251.08 County fee for service authority; alternate fee schedule; fee limits; adoption procedures.

.010 A bench warrant fee imposed pursuant to Maricopa County Superior Court Administrative Order No. 2004–199 is a fee statutorily authorized by A.R.S. § 11–251.08 and is not a criminal fine.

State v. Ayonayon, 245 Ariz. 286, 428 P.3d 203, ¶¶ 6–8 (Ct. App. 2018) (court rejected defendant's argument that bench warrant fee was illegal as constituting fine for criminal conviction for violation of a state statute and does not fall within body of criminal fines established by state legislature for felonies).

13–105(13) Definitions. (Dangerous offense.)

.010 A "dangerous offense" means an offense involving the discharge, use, or threatening exhibition of a deadly weapon or dangerous instrument against another person, or the intentional or knowing infliction of serious physical injury on another person.

State ex rel. Montgomery v. Brain (Hu), 244 Ariz. 525, 422 P.3d 1065, ¶¶ 8–26 (Ct. App. 2018) (defendant was charged with using metal rod to hit dog; state charged this as dangerous offense; court held person who uses dangerous instrument in committing animal cruelty offense may not be sentenced as dangerous offender).

13–116 Double punishment.

.070 In order to impose consecutive sentences for two crimes, the transaction must satisfy a **three-part** test: **First,** whether, after subtracting the facts necessary to support the primary charge, there are sufficient facts to support the secondary charge.

State v. Bush, 244 Ariz. 575, 423 P.3d 370, ¶¶ 88–93 (2018) (court held trial court properly imposed consecutive sentences for murder, burglary, robbery, attempted murder, and aggravated assault).

.080 In order to impose consecutive sentences for two crimes, the transaction must satisfy a **three-part** test: **Second,** whether the defendant could have committed the primary crime without committing the secondary crime.

State v. Bush, 244 Ariz. 575, 423 P.3d 370, ¶¶ 88–93 (2018) (court held trial court properly imposed consecutive sentences for murder, burglary, robbery, attempted murder, and aggravated assault).

.090 In order to impose consecutive sentences for two crimes, the transaction must satisfy a **three-part** test: **Third,** if the defendant could not have committed the primary crime without committing the secondary crime, did the defendant's commission of the secondary crime exposed the victim to more potential harm than necessary in committing the primary crime.

State v. Bush, 244 Ariz. 575, 423 P.3d 370, ¶¶ 88–93 (2018) (court held trial court properly imposed consecutive sentences for murder, burglary, robbery, attempted murder, and aggravated assault).

13–201 Requirements for criminal liability.

.070 The Arizona legislature has declined to adopt a defense of diminished capacity, thus a defendant is not permitted to introduce evidence that his or her mental state was such that he or she could not act intentionally or knowingly.

State v. Richter, 245 Ariz. 1, 424 P.3d 402, ¶¶ 14–24 (2018) (defendant was convicted of kidnapping and child abuse; because defendant did not claim her husband's behavior caused her some mental incapacity that negated her specific intent, but instead contended she acted out of fear as result of husband's abusive behavior, trial court erred in precluding her from presenting evidence and claiming duress defense).

13–206(A) Entrapment—Elements.

.040 To assert an entrapment defense, the defendant must admit all elements of the offense charged, and once admitted, a defendant may not then negate any of the elements of the offense by advancing the inconsistent theory of having committed some lesser offense; this principle does not bar the state from asking for a lesser-included offense instruction when the defense asserts entrapment.

State v. Trammell, 245 Ariz. 607, 433 P.3d 11, ¶¶ 6–7 (Ct. App. 2018) (defendant was charged with sale of narcotic drugs; defendant claimed entrapment; defendant objected to trial court's instructing on lesser-included offense of possession of narcotic drug, for which jurors found him guilty; court held that, under evidence presented, reasonable jurors could find that, while defendant was entrapped into selling narcotic drugs to undercover officer (and therefore not criminally liable for that offense), he was nonetheless guilty of simple possession of narcotic drugs because his possession of drugs before sale was not result of any police interaction).

13–401 Unavailability of justification defense; justification as defense.

.040 Although a mistaken identity defense and a justification defense are inconsistent, a defendant may assert both defenses if the facts support justification.

State v. Carson, 243 Ariz. 463, 410 P.3d 1230, ¶¶ 8–16 (2018) (after confrontation, witness saw defendant on ground and four men (including J.M. and S.B.) hitting and kicking him; witness pulled S.B. from fight and walked him across street; another witness saw man stand up, pull out gun, and start shooting at J.M., and then at S.B.; police found bodies of J.M. and S.B. 1½ to 2 blocks apart; J.M. was shot twice in back and S.B. was shot in side of chest and foot; defendant claimed mistaken identity; so trial court denied defendant's request for self-defense instruction; court held there was slightest evidence of self-defense, thus trial court erred in refusing self-defense instruction, even though those defenses were inconsistent).

13–412 Duress.

.010 A defendant is entitled to claim duress only upon presenting evidence that the defendant was compelled to engage in the proscribed conduct because of the threat or use of immediate physical force against the defendant or another.

State v. Richter, 245 Ariz. 1, 424 P.3d 402, ¶¶ 14–24 (2018) (defendant was convicted of kidnapping and child abuse; because defendant did not claim her husband's behavior caused her some mental incapacity that negated her specific intent, but instead contended she acted out of fear as result of husband's abusive behavior, trial court erred in precluding her from presenting evidence and claiming duress defense).

.030 Even if the threat or use of physical force is ongoing, that can establish a "threat or use of immediate physical force," and it becomes a jury question whether the threat or use is immediate.

State v. Richter, 245 Ariz. 1, 424 P.3d 402, ¶¶ 20–24 (2018) (evidence showed husband's abusive behavior occurred over several months).

13–417 Justification; necessity.

.010 To establish necessity, a defendant must show that he or she was compelled to engage in the proscribed conduct and had no reasonable alternative to avoid imminent injury greater than the injury that might reasonably result from the defendant's own conduct.

State v. Medina, 244 Ariz. 361, 418 P.3d 1134, ¶¶ 8–10 (Ct. App. 2018) (defendant was charged with possessing deadly weapon by prohibited possessor; defendant disclosed necessity defense; defendant's proposed evidence was that, about month prior to his arrest, "a man sitting on [defendant's girlfriend's] car said: Tell Taz Guerro says what's up," which he believed was threat to his life and that he was fleeing from Mexican mafia; court held none of this evidence suggests that any such threats posed risk of immediate injury, thus defendant was not entitled to necessity defense).

State v. Pina-Barajas, 244 Ariz. 106, 418 P.3d 473, ¶¶ 4–8 (Ct. App. 2018) (defendant was prohibited possessor and claimed he needed gun for protection; court noted that statements defendant sought to admit showed he had obtained and kept gun in response to incidents that had taken place 2 weeks earlier, and nothing indicated he had been subjected to any threat in intervening period, thus threat was not imminent; further, defendant made no showing he lacked any legal alternatives during those 2 weeks, or that those alternatives—such as alerting law enforcement to his predicament—were unreasonable; court thus held trial court correctly precluded defendant from presenting necessity defense).

13–502(A) Insanity test; burden of proof; guilty except insane verdict—Standard.

.030 The Arizona legislature has declined to adopt a defense of diminished capacity, thus a defendant is precluded from maintaining that he or she cannot reflect upon his or her actions (or has a lesser capacity to do so); the defendant may, however, introduce evidence demonstrating an ingrained character trait that rendered it less likely he or she acted with reflection and deliberation.

State v. Richter, 245 Ariz. 1, 424 P.3d 402, ¶¶ 14–24 (2018) (defendant was convicted of kidnapping and child abuse; because defendant did not claim her husband's behavior caused her some mental incapacity that negated her specific intent, but instead contended she acted out of fear as result of husband's abusive behavior, trial court erred in precluding her from presenting evidence and claiming duress defense).

State v. Malone, 245 Ariz. 103, 425 P.3d 592, ¶¶ 7–22 (Ct. App. 2018) (defendant's proffered expert testimony about brain damage was not to prove he was incapable of reflecting, but was instead offered to demonstrate brain condition that rendered it less likely that he may have done so; court concluded evidence was admissible to extent offered to corroborate defendant's claim he had character trait of impulsivity, but was not admissible to support claim that defendant was "incapable" of reflecting on, or premeditating, homicide; court further held any error in excluding proffered evidence was harmless). ***rev. granted***.

13–603(J) Authorized disposition of offenders—Fractions of months.

.020 In determining the length of the term of community supervision, the statute in effect in 1996 provided that "[t]he court shall round the term of community supervision imposed," expressing the term "only . . . in increments of years or months," and that "all fractions of the month may be increased or decreased to the nearest month."

Shadid v. State, 244 Ariz. 450, 421 P.3d 160, ¶¶ 4–6 (Ct. App. 2018) (court held that, because defendant committed his offense in 1996, AzDOC did not err in rounding period of community supervision up to the nearest month).

13–703(N) Repetitive offenders; sentencing—Proof of prior conviction.

.040 Although this section provides that the penalties prescribed by this section shall be substituted for the penalties otherwise authorized by law if an allegation of prior conviction is charged in the indictment or information and admitted or found by the court, it further provides that the release provisions prescribed by this section shall not be substituted for any penalties required by the substantive offense or a provision of law that specifies a later release or completion of the sentence imposed before release.

State v. Scalph, 245 Ariz. 177, 426 P.3d 305, ¶¶ 6–11 (Ct. App. 2018) (defendant was convicted of possession of methamphetamine, and trial court found he had two historical prior felony convictions; court held that, because possession of methamphetamine under § 13–3407(F) required trial court to impose flat-time sentence, trial court properly imposed flat-time sentence under that section, and properly sentenced defendant as repeat offender under § 13–703).

13–705(P) Dangerous crimes against children—Victim under 15 years of age.

.050 Although the DCAC designation does not apply when the victim is a fictitious child, the DCAC sentencing scheme applies if the specific statute so provides.

State v. Lantz, 245 Ariz. 451, 430 P.3d 1262, ¶¶ 10–15 (Ct. App. 2018) (defendant arranged to have sex with girl he thought was 13 years old, but was actually undercover police officer; defendant was convicted of child prostitution under § 13–3212, which provides that DCAC's sentencing scheme applies if victim is under 15 years of age; court struck DCAC designation, but affirmed sentencing under DCAC).

13–901.01(A) Probation for persons convicted of possession and use of controlled substances; treatment; prevention; education—First conviction.

.130 *Solicitation to sell a narcotic drug* does not constitute a prior conviction for personal possession and, therefore, does not preclude mandatory probation under § 13–901.01(A).

State v. Green, 245 Ariz. 529, 431 P.3d 599, ¶¶ 11–25 (Ct. App. 2018) (court concluded defendant's 2006 conviction for solicitation to sell narcotic drug was not disqualifying prior conviction, or "strike").

13–907 Setting aside judgment of convicted person on discharge; making of application; release from disabilities; exceptions.

.040 An application for restoration of the right to possess a firearms seeks relief from a sanction imposed in a criminal case, and restoration is provided under statutes and rules addressing applications arising from criminal cases, thus such an action is properly characterized as a criminal action, so the time for appeal is governed by the rules of criminal procedure.

State v. Perry, 245 Ariz. 310, 428 P.3d 509, ¶¶ 3–7 & n.2 (Ct. App. 2018) (defendant filed notice of appeal over 3 months after trial court entered its order denying his application, thus defendant's notice of appeal was untimely; court noted notice of appeal would have been untimely even under rules of civil procedure).

13–1202(B) Threatening or intimidating—Enhancement.

.010 Subsection (B)(2), which increases the punishment if the person is a criminal street gang member, is not unconstitutional vague or overbroad.

State v. Meeds, 244 Ariz. 454, 421 P.3d 653, ¶¶ 21–32 (Ct. App. 2018) (gang expert testified defendant met at least four of six criteria; court held First Amendment right of association does not prevent legislature from penalizing criminal street gang member who commits offense of threatening and intimidating more severely than one who is not criminal street gang member).

13–1204(A)(4) Aggravated assault—Victim bound or restrained.

.030 Sleeping renders the victim's capacity to resist substantially impaired.

State v. Duarte, 2018 WL 6241483, ¶¶ 12–17 (Ct. App. 2018) (defendant entered victim's home at night; victim testified she had been sleeping when he began "hitting [her]" and she woke up, and also stated that, because she had been sleeping, she did not hear him and she "[c]ould [not] fight back"; court held state presented substantial evidence from which reasonable jurors could have found defendant guilty of aggravated assault beyond reasonable doubt).

13–1301 Definitions (Restrain).

.010 "Restrain" means to restrict a person's movements without consent, without legal authority, and in a manner that interferes substantially with such person's liberty, by either moving such person from one place to another or by confining such person; restraint is without consent if it is accomplished by: (1) physical force, intimidation, or deception; or (2) any means including acquiescence of the victim if the victim is a child less than 18 years old or an incompetent person and the victim's lawful custodian has not acquiesced in the movement or confinement.

State v. Dutra, 245 Ariz. 180, 426 P.3d 308, ¶¶ 8–19 (Ct. App. 2018) (defendant entered store and pointed stun gun at employee; in response, employee took three steps back from counter, and then, in response to defendant's command and use of stun gun, took two steps forward and reached for cash register, all of which happened within 30 seconds of defendant's confronting employee; court held this evidence was sufficient for jurors to find that defendant substantially interfered with victim's liberty).

13–1802(A) Theft—Elements.

.020 Although **theft** is a lesser-included offense of **theft of a means of transportation,** and **theft** is a lesser-included offense of **robbery,** because **theft of a means of transportation** and **robbery** each has an element the other does not, **theft of a means of transportation** is not a lesser-included offense of **robbery.**

State v. Carter, 245 Ariz. 382, 429 P.3d 1176, ¶¶ 15–47 (Ct. App. 2018) (for victim #1, defendant was convicted of (felony) theft of property (between $4,000 and $25,000), vehicle theft, and robbery; for victim #2, defendant was convicted of (felony) vehicle theft and theft of property (more than $25,000); because of double jeopardy considerations, court vacated conviction for felony theft for victim #1, and felony vehicle theft for victim #2).

13–1814 Theft of means of transportation.

.030 Although **theft** is a lesser-included offense of **theft of a means of transportation,** and **theft** is a lesser-included offense of **robbery,** because **theft of a means of transportation** and **robbery** each has an element the other does not, **theft of a means of transportation** is not a lesser-included offense of **robbery.**

State v. Carter, 245 Ariz. 382, 429 P.3d 1176, ¶¶ 15–47 (Ct. App. 2018) (for victim #1, defendant was convicted of (felony) theft of property (between $4,000 and $25,000), vehicle theft, and robbery; for victim #2, defendant was convicted of (felony) vehicle theft and theft of property (more than $25,000); because of double jeopardy considerations, court vacated conviction for felony theft for victim #1, and felony vehicle theft for victim #2).

13–1902 Robbery.

.060 Although **theft** is a lesser-included offense of **theft of a means of transportation,** and **theft** is a lesser-included offense of **robbery,** because **theft of a means of transportation** and **robbery** each has an element the other does not, **theft of a means of transportation** is not a lesser-included offense of **robbery.**

State v. Carter, 245 Ariz. 382, 429 P.3d 1176, ¶¶ 15–47 (Ct. App. 2018) (for victim #1, defendant was convicted of (felony) theft of property (between $4,000 and $25,000), vehicle theft, and robbery; for victim #2, defendant was convicted of (felony) vehicle theft and theft of property (more than $25,000); because of double jeopardy considerations, court vacated conviction for felony theft for victim #1, and felony vehicle theft for victim #2).

13–1904 Armed robbery.

.030 A person who positions a part of the body under clothing in such a way that it simulates a deadly weapon may be convicted of armed robbery.

State v. Montes Flores, 245 Ariz. 303, 428 P.3d 502, ¶¶ 5–12 (Ct. App. 2018) (court held statute was constitutional).

.040 If a person positions a part of the body under clothing in such a way that it simulates a deadly weapon, there is no requirement that the victim of the robbery must see the person use part of the body to simulate a weapon.

State v. Montes Flores, 245 Ariz. 303, 428 P.3d 502, ¶¶ 24–30 (Ct. App. 2018) (defendant slid his hand beneath his shirt and under waistband of his pants, leaned forward, and demanded, "Give me all your money, I have a gun"; after defendant repeated his statement, victim quickly opened register and began to pull money from the drawer; court rejected defendant's contention that statute required proof that victim felt threatened by or even perceived simulated weapon).

13–2314(C) Racketeering; civil remedies by the state; definitions—Seizure warrant.

.010 Unlike a search warrant, which must be executed within 5 days, a seizure warrant is not subject to the same statutory 5-day requirement.

State ex rel. Brnovich v. Miller, 245 Ariz. 323, 429 P.3d 556, ¶¶ 6–7 (Ct. App. 2018) (on April 17, 2015, state obtained seizure warrant; between July 22, 2016, and January 30, 2017, state seized funds from Miller's inmate trust account; court rejected Miller's claim that, because seizure took place more than 5 days after seizure warrant was issued, seizure was void).

13–2501(1) Escape and related offenses; Definitions—Contraband.

.010 This section defines "contraband" as "any dangerous drug, narcotic drug, marijuana, intoxicating liquor of any kind, deadly weapon, dangerous instrument, explosive, wireless communication device, multimedia storage device or other article whose use or possession would endanger the safety, security or preservation of order in a correctional facility."

State v. Francis, 243 Ariz. 434, 410 P.3d 416, ¶ 7 (2018) (statute lists "wireless communication device," thus cell phone is contraband; defendant knew he possessed cell phone, issue was whether he needed to know cell phone was contraband).

13–2505 Promoting prison contraband; definitions.

.020 A person promotes prison contraband if the person knowingly makes, obtains, or possesses contraband while incarcerated; the statutory scheme as a whole does not require proof that the defendant knew the item possessed is statutorily defined as contraband.

State v. Francis, 243 Ariz. 434, 410 P.3d 416, ¶¶ 9–14 (2018) (when arrested, officers took defendant's possessions, including his cell phone; when defendant asked to call his attorney, officer gave him back his cell phone; once defendant was transported to jail, another officer noticed defendant had his cell phone; court held trial court correctly ruled state was not required to prove defendant knew cell phone was contraband).

13–2508(A) Resisting arrest—Actions against peace officer.

.060 Multiple arresting officers may be the victims of a single charge of resisting arrest, thus each retains the right to refuse pretrial defense interviews.

State v. Matthews, 245 Ariz. 281, 428 P.3d 198, ¶¶ 5–13 (Ct. App. 2018) (two officers saw defendant and told him he had outstanding arrest warrant, when defendant tried to leave, officers grabbed his arms, but he continued to struggle against them; state charged defendant with one count of resisting arrest; trial court did not err in allowing officers to refuse pretrial interview).

13–2508(A)(1) Resisting arrest—Using or threatening to use physical force.

.040 Resisting arrest under (A)(1) involves using or threatening force against an officer, while resisting arrest under (A)(3) involves engaging in passive resistance, which subsection (C) defines as "a nonviolent physical act or failure to act that is intended to impede, hinder or delay the effecting of an arrest," thus committing resisting arrest using physical force against the officer under (A)(1) means the person cannot have committed resisting arrest by passive resistance under (A)(3) because using or threatening force is not "nonviolent"; resisting arrest by passive resistance therefore is not a lesser-included offense of resisting arrest under (A)(1), but instead is merely an alternative way to commit resisting arrest.

State v. Matthews, 245 Ariz. 281, 428 P.3d 198, ¶¶ 14–16 (Ct. App. 2018) (two officers saw defendant and told him he had outstanding arrest warrant, when defendant tried to leave, officers grabbed his arms, but he continued to struggle against them; state charged defendant with one count of resisting arrest; court held trial court did not err in refusing to instruct that resisting arrest under (A)(3) was a lesser-included offense under (A)(1); moreover, court held evidence did not support instruction on passive resistance).

13–2508(A)(3) Resisting arrest—Passive resistance.

.010 Resisting arrest under (A)(1) involves using or threatening force against an officer, while resisting arrest under (A)(3) involves engaging in passive resistance, which subsection (C) defines as "a nonviolent physical act or failure to act that is intended to impede, hinder or delay the effecting of an arrest," thus committing resisting arrest using physical force against the officer under (A)(1) means the person cannot have committed resisting arrest by passive resistance under (A)(3) because using or threatening force is not "nonviolent"; resisting arrest by passive resistance therefore is not a lesser-included offense of resisting arrest under (A)(1), but instead is merely an alternative way to commit resisting arrest.

State v. Matthews, 245 Ariz. 281, 428 P.3d 198, ¶¶ 14–16 (Ct. App. 2018) (two officers saw defendant and told him he had outstanding arrest warrant, when defendant tried to leave, officers grabbed his arms, but he continued to struggle against them; state charged defendant with one count of resisting arrest; court held trial court did not err in refusing to instruct that resisting arrest under (A)(3) was a lesser-included offense under (A)(1); moreover, court held evidence did not support instruction on passive resistance).

13–2810 Interfering with judicial proceedings.

.020 An order entered pursuant to § 13–3602(A) has the force of a court order, and to violate that order is to disobey a court order under § 13–2810(A)(2); there is no requirement that the acts that give rise to this violation occur within the state boundaries.

Shah v. Vakharwala, 244 Ariz. 201, 418 P.3d 974, ¶¶ 1–12 (Ct. App. 2018) (court rejected defendant's contention that, because both he and his ex-wife were outside Arizona when he initiated video that was claimed violation of order of protection, Arizona court did not have jurisdiction; court held transmission of video was directed at ex-wife and therefore violated order of protection).

13–3212 Child prostitution.

.010 Because a rational basis exists to use undercover police officers to combat child prostitution, regardless whether the solicitation occurs online or in person (using undercover police officers in sting operations helps ensure that the people soliciting child prostitutes are stopped), legislature could have rationally believed that using undercover officers and other persons posing as minors would achieve its goal of protecting children from being sexually exploited, and as such, statute is constitutional.

State v. Burgess, 245 Ariz. 275, 428 P.3d 192, ¶¶ 10–15 (Ct. App. 2018) (defendant called and texted telephone numbers posted in online advertisements offering services of two female escorts, which listed escorts' ages as 18 and contained explicit sexual content; "Brittany" and "Jennifer" responded to defendant's calls and texts and asked him if he wanted services of two girls; he answered that he did; unbeknownst to defendant, they were undercover police officers posing as child prostitutes; "Brittany" and "Jennifer" informed Burgess they were 16 years old and that spending ½ hour with both would cost $160; defendant confirmed with them that they were not police officers, but he hesitated and stated he wanted 18-year-old escort; defendant ultimately agreed to meet them at their hotel room to "hang out"; Jennifer told defendant she would reduce price if he brought cigarettes because "we're pretty young and obviously we can't buy cigarettes," and defendant did so; court noted defendant completed offense when he agreed to pay for services, he thus committed offense before he saw girls).

.020 A person is subject to enhanced punishment under subsection (G) if the person believes the victim is 15 to 17 years of age, even if the victim is an undercover officer who is older than 17 years of age and is only posing as a person 15 to 17 years of age.

State v. Lantz, 245 Ariz. 451, 430 P.3d 1262, ¶¶ 10–15 (Ct. App. 2018) (defendant arranged to have sex with girl he thought was 13 years old, but was actually undercover police officer; defendant was convicted of child prostitution under § 13–3212, which provides that DCAC's sentencing scheme applies if victim is under 15 years of age; court struck DCAC designation, but affirmed sentencing under DCAC).

.030 Because subsection (I) provides that, if the minor is 15, 16, or 17 years of age, the person convicted shall be sentenced pursuant to this section, sentencing for multiple prior convictions is pursuant to this subsection and not § 13–703(L).

State v. Burgess, 245 Ariz. 275, 428 P.3d 192, ¶¶ 19–22 (Ct. App. 2018) (defendant had two prior convictions that he committed on same occasion; court held trial court erred in considering these as one prior conviction, and should have sentenced him with two prior convictions).

13–3602 Order of protection; procedure; contents; arrest for violation; penalty; protection order from another jurisdiction.

.030 An order entered pursuant to § 13–3602(A) has the force of a court order, and to violate that order is to disobey a court order under § 13–2810(A)(2); there is no requirement that the acts that give rise to this violation occur within the state boundaries.

Shah v. Vakharwala, 244 Ariz. 201, 418 P.3d 974, ¶¶ 1–12 (Ct. App. 2018) (court rejected defendant's contention that, because both he and his ex-wife were outside Arizona when he initiated video that was claimed violation of order of protection, Arizona court did not have jurisdiction; court held transmission of video was directed at ex-wife and therefore violated order of protection).

13–3821 Persons required to register; procedure.

.020 Although sex-offender registration pursuant to § 13–3821(A)(3) is a penalty under the *Derendal* collateral consequences test, it is not a penalty that increases the statutory maximum sentence for sexual abuse under § 13–1404(A) because the overriding purpose of § 13–3821 is facilitating the location of child sex offenders by law enforcement personnel and thus its purpose is regulatory in nature, not punitive, so *Apprendi* does not apply to § 13–3821(A)(3).

State v. Trujillo, 245 Ariz. 414, 430 P.3d 379, ¶¶ 19–21 (Ct. App. 2018) (defendant was convicted of sexual abuse, and trial court ordered him to register as sex offender).

13–3918 Time of execution and return.

.030 Unlike a search warrant, which must be executed within 5 days, a seizure warrant is not subject to the same statutory 5-day requirement.

State ex rel. Brnovich v. Miller, 245 Ariz. 323, 429 P.3d 556, ¶¶ 6–7 (Ct. App. 2018) (on April 17, 2015, state obtained seizure warrant; between July 22, 2016, and January 30, 2017, state seized funds from Miller's inmate trust account; court rejected Miller's claim that, because seizure took place more than 5 days after seizure warrant was issued, seizure was void).

13–3988(A) Admissibility of confessions—Voluntariness hearing.

.010 This section provides that, before any confession is received in evidence, the trial court must determine any issue of voluntariness out of the presence of the jurors; because there is no "issue" until such time as the defendant challenges the voluntariness of the confession, the trial court is not required to hold a voluntariness hearing until the defendant makes such a challenge.

State v. Bush, 244 Ariz. 575, 423 P.3d 370, ¶¶ 49–52 (2018) (defendant contended on appeal his confession was involuntary because State "extracted [it] using coercive promises" and because his "will was overborne by the State's coercive conduct"; court noted that, at no point before or during trial did defendant move to suppress evidence of his statements, request voluntariness hearing, or object to admission of his statements, and that defendant did not argue that his failure to move to do so was based on evidence that "was not then known" or that "could not then have been known" if he exercised "reasonable diligence" to discover it; court thus held defendant forfeited his argument by failing to raise any issue about voluntariness of his confession; court noted that Supreme Court in *Wainwright v. Sykes* clarified rule in *Jackson v. Denno* and rejected interpretation of *Jackson* that it had applied in older line of cases, and therefore disavowed any statements in those older cases that are inconsistent with *Wainwright* or *State v. Alvarado.*)

State v. Snee, 244 Ariz. 37, 417 P.3d 802, ¶¶ 3–10 (Ct. App. 2018) (before trial, defendant filed motion to suppress confession, but later withdrew it; on appeal, he argued that § 13–3988(A) required trial court, sua sponte, to conduct a voluntariness hearing because evidence indicated confession was induced by impermissible promise; court rejected defendant's contention).

13–4062(1) Anti-marital fact privilege; other privileged communications—Husband-wife.

.020 When a defendant commits a crime against his or her spouse and is charged for that crime, the crime exception to the anti-marital fact privilege allows the witness-spouse to testify about not only that charge, but also about any charges arising from the same unitary event.

Phoenix City Pros. v. Lowery, 245 Ariz. 424, 430 P.3d 884, ¶¶ 1, 10–18 (2018) (husband was concerned wife (defendant) had been drinking and might try to drive, so he parked couple's car behind couple's van to prevent wife from driving away; wife, intoxicated and undeterred by car blocking her way, backed van out, shoving car 15 feet down the driveway; when police arrived, wife was not in van; officer noted property damage to van and car; wife was charged with DUI and criminal damage (domestic violence); court held husband was victim of criminal damage charge, so anti-marital fact privilege did not apply for that charge, and because criminal damage and DUI charges arose out of unitary event, anti-marital fact privilege did not apply for that charge either).

13–4305(A) Seizure of property—Methods of seizing—Seizure warrant.

.010 Unlike a search warrant, which must be executed within 5 days, a seizure warrant is not subject to the same statutory 5-day requirement.

State ex rel. Brnovich v. Miller, 245 Ariz. 323, 429 P.3d 556, ¶¶ 6–7 (Ct. App. 2018) (on April 17, 2015, state obtained seizure warrant; between July 22, 2016, and January 30, 2017, state seized funds from Miller's inmate trust account; court rejected Miller's claim that, because seizure took place more than 5 days after seizure warrant was issued, seizure was void).

13–4310(A) Judicial forfeiture proceedings; general—Seizure warrant.

.010 Unlike a search warrant, which must be executed within 5 days, a seizure warrant is not subject to the same statutory 5-day requirement.

State ex rel. Brnovich v. Miller, 245 Ariz. 323, 429 P.3d 556, ¶¶ 6–7 (Ct. App. 2018) (on April 17, 2015, state obtained seizure warrant; between July 22, 2016, and January 30, 2017, state seized funds from Miller's inmate trust account; court rejected Miller's claim that, because seizure took place more than 5 days after seizure warrant was issued, seizure was void).

13–4312(C) Judicial in personam forfeiture proceedings—Seizure warrant.

.010 Unlike a search warrant, which must be executed within 5 days, a seizure warrant is not subject to the same statutory 5-day requirement.

State ex rel. Brnovich v. Miller, 245 Ariz. 323, 429 P.3d 556, ¶¶ 6–7 (Ct. App. 2018) (on April 17, 2015, state obtained seizure warrant; between July 22, 2016, and January 30, 2017, state seized funds from Miller's inmate trust account; court rejected Miller's claim that, because seizure took place more than 5 days after seizure warrant was issued, seizure was void).

13–4401(19) Definitions. (Victim.)

.040 The Arizona Constitution provides that, if the person is killed or is incapacitated, "victim" includes the person's spouse, parent, child, or other lawful representative, and A.R.S. § 13–4401(19) has broadened that class to include grandparent, sibling, or any other person related to the second degree by consanguinity or affinity; but nothing the constitution or statute provides that only one of these classes of persons may be considered the victim's representative.

E.H. v. Slayton (Conlee), 245 Ariz. 331, 429 P.3d 564, ¶¶ 1–10 (Ct. App. 2018) (Conlee was charged with killing victim, and trial court had designated advocate from county victim witness services as represented; court held trial court erred in refusing to designate victim's sister as additional representative).

15–108 Medical marijuana; school campuses.

.010 Although the AMMA does not prevent a property owner (including the state) from prohibiting medical marijuana use on the owner's property, it does prohibit the criminalization of marijuana use; because A.R.S. § 15–108(A) criminalizes medical marijuana use, it does not further the purpose of the AMMA, thus it violates the Voter Protection Act and is therefore unconstitutional.

State v. Maestas, 244 Ariz. 9, 417 P.3d 774, ¶¶ 13–24 (2018) (officer arrested defendant after observing him sitting near his dormitory on university campus; officer searched him and found valid AMMA registry identification card in his wallet; after defendant admitted he had marijuana in his dorm room, officer obtained search warrant, searched defendant's dorm room, and found two envelopes containing 0.4 grams of marijuana).

36–2804.03(C) Arizona Medical Marijuana Act—Issuance of registry identification cards.

.010 Under this section, a physician's recommendation letter issued pursuant to California's Compassionate Use Act is equivalent to a registry identification card issued to an Arizona resident under Arizona's Medical Marijuana Act and a visiting qualifying patient, as defined by the Act, is entitled to possess and use medical marijuana in Arizona.

State v. Kemmish, 244 Ariz. 314, 418 P.3d 1087, ¶¶ 9–15 (Ct. App. 2018) (officers stopped defendant for headlight violation; defendant told officers he had medical-grade marijuana in vehicle that he bought in California; defendant said he had document permitting him to purchase medical marijuana in California, and showed officers physician's recommendation letter obtained pursuant to California's Compassionate Use Act; that letter stated that, in his "professional opinion, [Kemmish] would significantly benefit from the use of medical marijuana," and "approve[d] the use of cannabis as medicine.").

36–2811(B) Arizona Medical Marijuana Act—Presumption of medical use of marijuana; protections; civil penalty—registered qualifying patient or caregiver.

.010 This statute does not provide immunity from prosecution for possession of hashish.

State v. Jones, 245 Ariz. 46, 424 P.3d 447, ¶¶ 1–15 (Ct. App. 2018) (defendant possessed 0.050 ounces of hashish). ***rev. granted***.

ARTICLE III. RIGHTS OF PARTIES.

RULE 6. ATTORNEYS, APPOINTMENT OF COUNSEL.

Rule 6.1(c) Rights to counsel; duties of counsel; court-appointed attorneys, investigators, and experts.

6.1.c.300 The defendant must make the request for self-representation in a timely manner, which means before the jury is empaneled; if the defendant makes the request **before** that time, the trial court still has the discretion whether to deny the request for self-representation if it determines the defendant made the request for the purpose of delaying or disrupting the trial.

State v. Weaver, 244 Ariz. 101, 418 P.3d 468, ¶¶ 8–16 (Ct. App. 2018) (on morning of trial, before first panel of jurors were called, defendant stated he wanted to represent himself, but said he was not ready for trial and requested continuance; trial court denied request; after recess, but before first potential jurors entered courtroom, defendant said he still wanted to represent himself and was ready to go without continuing trial; trial court stated it had already ruled on that motion and trial was moving forward; court held that, because defendant said he was ready to go to trial, trial court erred in denying request for self-representation).

RULE 10. CHANGE OF JUDGE OR PLACE OF TRIAL.

Rule 10.2(b) Change of judge as a matter of right—Procedure.

10.2.b.010 A party may exercise a right to change of judge by filing a "Notice of Change of Judge" signed by counsel or a self-represented defendant, stating the name of the judge to be changed, and including an avowal that the party is making the request in good faith and not for an improper purpose; an attorney's avowal is in the attorney's capacity as an officer of the court.

Gilbert Pros. Off. v. Foster (Beatty), 245 Ariz. 15, 424 P.3d 416, ¶ 8 (Ct. App. 2018) (court noted rule was amended in 2001 to require avowal).

10.2.b.030 Because Rule 10.2 contains no language beyond the basic requirement of filing a notice and an avowal, the opposing party does not have to the right to a hearing to determine the reasons for the notice.

Gilbert Pros. Off. v. Foster (Beatty), 245 Ariz. 15, 424 P.3d 416, ¶¶ 9–14 (Ct. App. 2018) (court noted that, if one party contends other party filed notice for improper purpose, remedy is to file complaint with proper authorities alleging professional misconduct under ethical rules).

Rule 10.3(b) Changing the place of trial—Prejudicial pretrial publicity.

10.3.b.010 With pre-trial publicity, no presumption of prejudice exists unless the publicity is so unfair, so prejudicial, and so pervasive that the court cannot give credibility to the jurors' answers during voir dire.

State v. Bush, 244 Ariz. 575, 423 P.3d 370, ¶¶ 11–14 (2018) (court noted most publicity occurred in immediate aftermath of crimes (approximately 2 years before defendant's trial) and most news accounts were essentially factual, and held presumption of prejudice did not arise merely because media published interview to which defendant agreed, or other articles stating he confessed to murders or discussing facts adduced during codefendant's trial that implicated defendant).

10.3.b.020 If a party is unable to show that the extent of the pre-trial publicity created a presumption of prejudice, the party is entitled to a change of venue only if the party is able to show that the publicity had such an actual effect on the prospective jurors that there is a reasonable probability the party will be deprived of a fair trial; to find actual prejudice, jurors must have formed preconceived notions of guilt they were unable to set aside.

State v. Bush, 244 Ariz. 575, 423 P.3d 370, ¶¶ 15–17 (2018) (all empaneled jurors disclosed their preliminary opinions about defendant's guilt and provided adequate assurances they would set their opinions aside and consider only evidence presented at trial, and nothing in record supported departing from well-established presumption that jurors followed trial court's instructions to consider only the evidence presented at trial, thus trial court did not abuse its discretion in denying defendant's motion for change of venue).

ARTICLE IV. PRETRIAL PROCEDURES.

RULE 12. THE GRAND JURY.

Rule 12.1(d) Selecting and preparing grand jurors—Instructions.

12.1.d.010 A prosecutor has a duty to instruct the grand jury on all the law applicable to the facts of the case, including providing instructions on justification defenses that, based on the evidence presented to the grand jury, are relevant to the jurors' determination whether probable cause exists to indict the defendant.

Dominguez v. Foster, 243 Ariz. 499, 413 P.3d 1249, ¶¶ 6–13 (Ct. App. 2018) (court held that, when instructing grand jurors on definition of "premeditation" for purposes of first-degree murder, prosecutor must instruct them as *Thompson* requires and must provide them with written copy of expanded and clarified definition for their reference during deliberations, and when they are about to hear evidence on first-degree murder charge and prosecutor asks them whether they want to have any statutes reread or clarified, when it comes to term "premeditation," prosecutor may not simply refer them to statutory definition, but must refer them to expanded and clarified *Thompson* definition).

RULE 13. INDICTMENT AND INFORMATION.

Rule 13.1(e) Definitions and construction—Necessarily included offenses.

13.1.e.120 If the verdict form includes both the charge and a lesser-included offense, if the jurors indicate they have found the defendant not guilty of the greater charge and guilty of the lesser-included offense, if the conviction is later reversed, the defendant may not be retried for the greater offense; if the jurors indicate they are unable to agree on the greater charge and they find the defendant guilty of the lesser-included offense, if the conviction is later reversed, the defendant may be retried for the greater offense.

State v. Martin, 245 Ariz. 42, 424 P.3d 443, ¶¶ 10–13 (Ct. App. 2018) (defendant was tried for first-degree murder, but jurors, after marking on verdict form they were "Unable to agree" on first-degree murder, convicted him of lesser-included offense of second-degree murder; following successful appeal, defendant was retried and convicted of first-degree murder; court held double jeopardy did not bar defendant's second trial for first-degree murder).

Rule 13.3(a) Joinder—Of offenses.

13.3.a.040 When numerous transactions are merely parts of a larger scheme, a single count encompassing the entire scheme is proper.

State v. Sanders, 245 Ariz. 113, 425 P.3d 1056, ¶¶ 70–71 (2018) (defendant was charged with child abuse based on acts he committed over several months; defendant contended charge was duplicative because it created risk of non-unanimous jury verdict; court noted indictment informed defendant that charge was based on his ongoing course of conduct, and that it had held that "where numerous transactions are merely parts of a larger scheme, a single count encompassing the entire scheme is proper").

Rule 13.5(b) Amending charges; defects in the charging document—Altering the charges; amending to conform to the evidence.

13.5.b.030 The state may move to amend the charging document as long as the amendment does not change the nature of the offense or does not prejudice the defendant.

State v. Montes Flores, 245 Ariz. 303, 428 P.3d 502, ¶¶ 13–21 (Ct. App. 2018) (defendant was charged with armed robbery under section (A)(1), which prohibits robbery if person is armed with simulated deadly weapon, while trial court's instruction mirrored section (A)(2), which prohibits robbery if person uses or threatens to use simulated deadly weapon; defendant argued indictment alleged he *possessed* simulated deadly weapon, but jurors were instructed on *use or threatened use* of simulated deadly weapon; court concluded that, assuming jury instruction amounted to material change in indictment, defendant was not prejudiced by any violation of Rule 13.5(b) because record reflected that defendant knew state was alleging and intending to prove he threatened to use simulated deadly weapon during commission of robbery).

RULE 15. DISCLOSURE.

Rule 15.1(b)(5) The state's disclosure—Supplemental disclosure—Papers, documents, photographs, or tangible objects.

15.1.b.5.030 The trial court is under no obligation to order the state to acquire, produce, or create records that are not in its possession or control.

State v. Kellywood, 246 Ariz. 45, 433 P.3d 1205, ¶¶ 7–10 (Ct. App. 2018) (defendant was charged with sexually molesting adopted daughter when she was between 11 and 14 years old and sought her school records, search history, Facebook entries, and text messages, arguing this information "would have addressed issues with A.K.'s credibility as an accuser"; court noted these materials were not in state's control).

Rule 15.1(b)(8) The state's disclosure—Supplemental disclosure—Mitigation evidence.

15.1.b.8.020 The state is not required to disclose to the defendant evidence that would not tend to mitigate or negate the defendant's guilt or reduce the possible punishment.

State v. Kellywood, 246 Ariz. 45, 433 P.3d 1205, ¶¶ 16–17 (Ct. App. 2018) (defendant was charged with sexually molesting adopted daughter when she was between 11 and 14 years old and sought her DCS records; court noted nothing in case indicated DCS records contained any exculpatory information, thus state was not required to disclose them).

Rule 15.7(c) Disclosure violations and sanctions—Sanctions.

15.7.c.040 In determining whether to impose sanctions, the trial court should consider (1) how vital the witness is to the case, (2) whether the opposing party will be surprised, (3) whether the discovery violation was motivated by bad faith, and (4) any other relevant circumstances.

State v. Medina, 244 Ariz. 361, 418 P.3d 1134, ¶¶ 4–7 (Ct. App. 2018) (defendant was charged with possessing deadly weapon by prohibited possessor; defendant disclosed necessity defense, but conceded disclosure was untimely; trial court precluded defendant's necessity defense; court noted Arizona Supreme Court has concluded failure to conduct inquiry into discovery violation constitutes error, and that nothing in record demonstrated trial court considered listed factors or any lesser sanction, such as a continuance, but concluded defendant's proffered testimony would not have established necessity defense, so any error was harmless).

RULE 16. PRETRIAL MOTIONS AND HEARINGS.

Rule 16.1(b) General provisions—Pretrial motions.

16.1.b.010 A party is required to make all motions no later than 20 days prior to trial, or at such other time as the court may direct.

State v. Bush, 244 Ariz. 575, 423 P.3d 370, ¶¶ 49–52 (2018) (on appeal, defendant contended confession was involuntary because state "extracted [it] using coercive promises" and because his "will was overborne by the state's coercive conduct"; court noted that, at no point before or during trial did defendant move to suppress evidence of his statements, request voluntariness hearing, or object to admission of his statements; court thus held defendant forfeited his argument by failing to raise any issue about voluntariness of his confession in timely manner, as procedural rules required).

Rule 16.1(c) General provisions—Effect of a failure to file or make a timely motion.

16.1.c.020 If a party does not make a motion or objection 20 days before trial or when the basis for the motion or objection was known, the party waives the right to make the motion or to object at trial and waives the right to raise the issue on appeal.

State v. Bush, 244 Ariz. 575, 423 P.3d 370, ¶¶ 49–52 (2018) (on appeal, defendant contended confession was involuntary because state "extracted [it] using coercive promises" and because his "will was overborne by the state's coercive conduct"; court noted that, at no point before or during trial did defendant move to suppress evidence of his statements, request voluntariness hearing, or object to admission of statements, and that he did not argue that his failure to do so was based on evidence that "was not then known" or that "could not then have been known" if he exercised "reasonable diligence" to discover it; court thus held defendant forfeited argument by failing to raise any voluntariness issue in timely manner, as rules required).

ARTICLE VI. TRIAL.

RULE 18. TRIAL BY JURY; WAIVER; SELECTION AND PREPARATION OF JURORS.

Rule 18.5(d) Procedure for jury selection—Voir dire examination.

18.5.d.090 If a party requests voir dire, the trial court must permit the party a reasonable time, with other reasonable limitations, to conduct an examination.

State v. Acuna Valenzuela, 245 Ariz. 197, 426 P.3d 1176, ¶¶ 15–18 (2018) (trial court stated it would provide "approximately 20 minutes" per side for small panel voir dire; court noted trial court did provide defendant's attorney with additional time when requested).

State v. Sanders, 245 Ariz. 113, 425 P.3d 1056, ¶¶ 46–48 (2018) (defendant claimed trial court violated constitutional right to impartial jury by imposing 5-minute limit (per side) for individual voir dire; court noted trial court is permitted to "impose reasonable limitations" on voir dire, that there was no indication defendant was denied opportunity to voir dire any juror, and that, when either attorney requested additional time to finish their voir dire, trial court granted request).

State v. Bush, 244 Ariz. 575, 423 P.3d 370, ¶¶ 34–37 (2018) (defendant asked to present to prospective jurors during voir dire some graphic photographs of murder victims and tape recording of victim's 911 call that State intended to introduce as evidence at trial, contended this was necessary to identify jurors who, after seeing photographs and hearing recording, would be "substantially impaired" from being fair and impartial during mitigation phase; court noted that, in defendant's attorney's voir dire questioning, he repeatedly referred to case as involving "first degree, premeditated, cold-blooded, inexcusable murder" and vividly described "gruesome photographs" and other "gut-wrenching" evidence that would be presented, and was allowed to question potential jurors on whether anticipated evidence would prevent them from being fair and impartial; court held that, because defendant's statements sufficiently informed potential jurors about graphic nature of evidence, and that exposing jurors to 911 tape and photographs would have unnecessarily risked conditioning them to State's damaging evidence, trial court did not err in precluding defendant from presenting that evidence during voir dire).

Rule 18.5(f) Procedure for jury selection—Challenge for cause.

18.5.f.030 A prospective juror who knows someone involved in the case is not automatically barred from serving on the jury.

State v. Acuna Valenzuela, 245 Ariz. 197, 426 P.3d 1176, ¶¶ 31–32 (2018) (prospective juror admitted to close friendship with prosecutor in Maricopa County Attorney's Office, but stated she thought it would "more likely than not" be irrelevant to her ability to be fair and impartial; court held trial court did not abuse discretion in denying motion to strike this juror).

RULE 19. TRIAL.

Rule 19.1(a)(2) Conduct of trial—Generally—Modification.

19.1.a.2.010 With permission of the court, the parties may agree to a different method of proceeding than described in Rule 19.1.

Barns v. Bernini, 245 Ariz. 185, 426 P.3d 313, ¶¶ 12–19 (Ct. App. 2018) (as result of death from vehicle collision, state charged defendant with manslaughter and endangerment, alleged both counts were dangerous, and alleged any lesser-included count was dangerous; trial court instructed on manslaughter, endangerment, and negligent homicide, instructed that state had alleged that manslaughter and endangerment were dangerous offenses, and provided verdict forms by which jurors could find that manslaughter and endangerment were dangerous offenses; jurors found defendant not guilty of manslaughter, guilty of negligent homicide and endangerment, and found endangerment was dangerous offense; prior to polling of jurors, prosecutor brought to attention of trial court that jurors had not been instructed that negligent homicide was alleged to be dangerous, nor had they been given a verdict form for dangerousness for that offense, and asked that jurors be so instructed and returned for deliberation on that issue; defendant objected and trial court refused to do so; court rejected defendant's contention that state implicitly agreed to forgo bifurcation procedure for issue of dangerousness and thereby waived that issue when trial court failed to instruct jurors on dangerousness and provide verdict form; court held defendant was not acquitted on issue of dangerousness for negligent homicide, so retrying defendant on that issue did not violate provision against double jeopardy).

RULE 21. INSTRUCTIONS.

Willits instruction.

21.1.810 A defendant is not entitled to a *Willits* instruction unless the defendant can show that (1) the state failed to preserve material evidence that was reasonably accessible, (2) the evidence might have exonerated the defendant, and (3) as a result, the defendant suffered prejudice.

State v. Todd, 244 Ariz. 374, 418 P.3d 1147, ¶¶ 21–24 (Ct. App. 2018) (defendant claimed trial court should have given *Willits* instruction because state lost recordings of her interview with deputy and did not produce DNA or fingerprint evidence from gun deputies seized; although deputy did not record interview, he did take notes and produce written report memorializing that interview; because defendant failed to describe any concrete exculpatory evidence that recording would have contained and that deputy's notes did not, defendant did not demonstrate that any lost evidence had tendency to exonerate her; further, state's decision not to develop DNA or fingerprint evidence from gun deputies seized did not constitute loss or destruction of evidence, and defendant was entitled to examine and test gun herself, but apparently elected not to do so).

RULE 22. DELIBERATIONS.

Rule 22.5(a)(1) Discharge—Generally—Verdict recorded.

22.5.a.1.020 a verdict is not "recorded," and the jurors are not subject to discharge under Rule 22.5, until after the parties have responded to a court's invitation to poll the jurors as provided under Rule 23.3.

Barns v. Bernini, 245 Ariz. 185, 426 P.3d 313, ¶¶ 20–25 (Ct. App. 2018) (state charged defendant with manslaughter and endangerment, alleged both counts were dangerous, and alleged any lesser-included count was dangerous; trial court instructed on manslaughter, endangerment, and negligent homicide, instructed that state had alleged that manslaughter and endangerment were dangerous offenses, and provided verdict forms by which jurors could find that manslaughter and endangerment were dangerous offenses; jurors found defendant

not guilty of manslaughter, guilty of negligent homicide and endangerment, and found endangerment was dangerous offense; prior to polling of jurors, prosecutor brought to attention of trial court that jurors had not been instructed that negligent homicide was alleged to be dangerous, nor had they been given a verdict form for dangerousness for that offense, and asked that jurors be so instructed and returned for deliberation on that issue; defendant objected and contended trial court was required to discharge jurors under Rule 22.5; court held that, because trial court had not yet asked parties whether either wanted jurors polled, verdicts were not yet "recorded").

RULE 23. VERDICT.

Rule 23.3 Polling the jurors.

23.3.070 a verdict is not "recorded," and the jurors are not subject to discharge under Rule 22.5, until after the parties have responded to a court's invitation to poll the jurors as provided under Rule 23.3.

Barns v. Bernini, 245 Ariz. 185, 426 P.3d 313, ¶¶ 20–25 (Ct. App. 2018) (state charged defendant with manslaughter and endangerment, alleged both counts were dangerous, and alleged any lesser-included count was dangerous; trial court instructed on manslaughter, endangerment, and negligent homicide, instructed that state had alleged that manslaughter and endangerment were dangerous offenses, and provided verdict forms by which jurors could find that manslaughter and endangerment were dangerous offenses; jurors found defendant not guilty of manslaughter, guilty of negligent homicide and endangerment, and found endangerment was dangerous offense; prior to polling of jurors, prosecutor brought to attention of trial court that jurors had not been instructed that negligent homicide was alleged to be dangerous, nor had they been given a verdict form for dangerousness for that offense, and asked that jurors be so instructed and returned for deliberation on that issue; defendant objected and contended trial court was required to discharge jurors under Rule 22.5; court held that, because trial court had not yet asked parties whether either wanted jurors polled, verdicts were not yet "recorded").

ARTICLE VII. POST-VERDICT PROCEEDINGS.

RULE 24. POST-TRIAL MOTIONS.

Rule 24.1(d) Motion for new trial—Admissibility of juror evidence to impeach the verdict.

24.1.d.020 The trial court is not allowed to inquire into the subjective motives or mental processes that lead a juror to assent or dissent from the verdict.

State v. Acuna Valenzuela, 245 Ariz. 197, 426 P.3d 1176, ¶¶ 51–64 (2018) (day after jurors' verdict of death, juror posted blog wherein she described her reaction to defendant's attorney's questioning her during voir dire, shared her positive opinion of the prosecutor, and described her dissatisfaction with prosecution and defense; court noted statements by juror about their own or another's subjective feelings, developed during trial, are not competent evidence to impeach verdict, thus trial court did not abuse discretion in denying defendant's motion to vacate judgment without holding evidentiary hearing).

RULE 28. RETENTION AND DESTRUCTION OF RECORDS AND EVIDENCE.

Rule 28.2(b)(2) Disposition of evidence—Right to examine and record of disposal—Notice.

28.2.b.2.030 This rule applies to post-verdict proceedings and does not apply in pretrial discovery.

State v. Hulsey, 243 Ariz. 367, 408 P.3d 408, ¶¶ 16–19 (2018) (victim was shot in head, x-ray taken during autopsy revealed few scattered bullet fragments in skull; victim was later cremated; defendant contended state acted in bad faith in destroying evidence; court held Rule 28.2 did not apply).

RULE 29. RESTORATION OF CIVIL RIGHTS OR VACATION OF CONVICTION.

Rule 29.1 Grounds, notice.

29.1.010 An application for restoration of the right to possess a firearms seeks relief from a sanction imposed in a criminal case, and restoration is provided under statutes and rules addressing applications arising from criminal cases, thus such an action is properly characterized as a criminal action, so the time for appeal is governed by the rules of criminal procedure.

State v. Perry, 245 Ariz. 310, 428 P.3d 509, ¶¶ 3–7 & n.2 (Ct. App. 2018) (defendant filed notice of appeal over 3 months after trial court entered its order denying his application, thus defendant's notice of appeal was untimely; court noted notice of appeal would have been untimely even under rules of civil procedure).

ARTICLE VIII. APPEAL AND OTHER POST-CONVICTION RELIEF.

RULE 31. APPEAL FROM SUPERIOR COURT.

Rule 31.10(a) Contents of briefs—Appellant's opening brief.

31.10.a.030 When a defendant **did not** object at trial, a reviewing court will consider alleged trial error under the **fundamental error standard;** to show fundamental error, the defendant must demonstrate (1) the error goes to the foundation of the defendant's case, or (2) takes away a right essential to the defendant's defense, or (3) is of such magnitude that it denied the defendant a fair trial; to warrant reversal, the defendant must then show prejudice, but if the trial is found to have been unfair, prejudice is automatically established, and no further showing is required.

State v. Escalante, 245 Ariz. 135, 425 P.3d 1078, ¶¶ 8–43 (2018) (state introduced evidence that defendant had engaged in behaviors "indicative of and consistent with drug trafficking," such as driving in a manner designed to avoid police scrutiny ("heat runs"), using surveillance cameras at home, and traveling to areas of "known drug activity," and defendant's counsel did not object; court found fundamental error and prejudice, clarified definition of fundamental error, and provided examples to provide guidance for all three prongs).

Rule 31.10(a) Contents of briefs—Appellant's opening brief—Fundamental error.

31.10.a.fe.020 When a defendant **did not** object at trial, a reviewing court will consider alleged trial error under the **fundamental error standard;** to show fundamental error, the defendant must demonstrate (1) the error goes to the foundation of the defendant's case, or (2) takes away a right essential to the defendant's defense, or (3) is of such magnitude that it denied the defendant a fair trial; to warrant reversal, the defendant must then show prejudice, but if the trial is found to have been unfair, prejudice is automatically established, and no further showing required.

State v. Escalante, 245 Ariz. 135, 425 P.3d 1078, ¶¶ 8–43 (2018) (state introduced evidence that defendant had engaged in behaviors "indicative of and consistent with drug trafficking," such as driving in a manner designed to avoid police scrutiny ("heat runs"), using surveillance cameras at home, and traveling to areas of "known drug activity," and defendant's counsel did not object; court found fundamental error and prejudice, clarified definition of fundamental error, and provided examples to provide guidance for all three prongs).

Rule 31.10(a) Contents of briefs—Appellant's opening brief—Appellate review.

31.10.a.ar.030 The appellant has the duty to make a record at trial to support the claim of error **on appeal,** and absent such a record, the appellate court will presume that the missing portions of the record support the trial court's actions.

State ex rel. Brnovich v. Miller, 245 Ariz. 323, 429 P.3d 556, ¶¶ 8–9 (Ct. App. 2018) (Miller contended failure to serve him with police reports used at trial violated due process clause of Fourteenth Amendment; state had filed motion in limine seeking to admit police reports describing Miller's arrest and associated police investigation and crime lab report confirming that 4 grams of crack cocaine were found at Miller's residence during his arrest; trial court issued advisory ruling granting motion, pending any objections raised by Miller at trial; at trial, discussion was held regarding state's motion, and police reports were ultimately admitted; Miller failed to provide trial transcript on appeal; based on assumption that missing portion of record would support court's findings and conclusions, court "cannot say [trial] court abused its discretion").

RULE 32. POST-CONVICTION RELIEF.

Rule 32.1(g) Scope of remedy—Significant change in the law.

32.1.g.010 A "significant change in the law" will occur when an appellate court overrules previously binding case law or when a statutory or constitutional amendment makes a definite break from prior case law, but does not occur when a case merely interprets a statutory or constitutional provision already in effect.

State v. Helm, 245 Ariz. 560, 431 P.3d 1213, ¶¶ 7–8 (Ct. App. 2018) (at age of 14, defendant murdered his father, his mother, and his sister; he subsequently pled guilty to first-degree murder, and two counts of second-degree murder, as well as related armed robbery; trial court sentenced him to life imprisonment with the possibility of parole after 25 years for first-degree murder, 21-year prison terms for each count of second-degree murder, and 21-year term for armed robbery; three sentences for murder were to be served consecutively to each other but concurrently with sentence for armed robbery; defendant contended *Miller v. Alabama* was significant change in law; court held *Miller* did not prohibit imposition of consecutive sentences that result in aggregate sentence that exceeds juvenile's life expectancy).